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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 MARK I. SOKOLOW, individually  
4 and as a natural guardian of  
5 Plaintiff Jamie A. Sokolow,  
6 et al.,

Plaintiffs,

v.

04 Civ. 397 (GBD)

7 PALESTINE LIBERATION  
8 ORGANIZATION, et al.,

9 Defendants.

10 -----x

11 November 19, 2012  
12 2:30 p.m.

13 Before:

14 HON. GEORGE B. DANIELS

District Judge

15 APPEARANCES

16 DAVID I. SCHOEN  
17 AARON SOLOMON  
18 Attorneys for Plaintiffs

19 MILLER & CHEVALIER CHARTERED  
20 Attorneys for Defendants  
21 BY: BRIAN A. HILL

22 MILLER KORZENIK SOMMERS LLP  
23 Attorneys for Movant  
24 BY: DAVID S. KORZENIK  
25 ITAI MAYTAL

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1 (Case called)

2 (In open court)

3 MR. KORZENIK: Your Honor, my name is David Korzenik  
4 with Miller Korzenik & Sommers, and we appear for the BBC, the  
5 British Broadcasting Corporation, a nonparty seeking to quash a  
6 subpoena served on us.

7 THE COURT: Good afternoon.

8 MR. SCHOEN: David Schoen for the plaintiffs, and with  
9 me is Aaron Solomon.

10 MR. HILL: Good afternoon, your Honor. Brian Hill for  
11 the defendants the Palestine Liberation Organization and the  
12 Palestinian Authority.

13 MR. KORZENIK: And we left out my associate.

14 MR. WOLFSON: Itai Maytal for the nonparty BBC.

15 THE COURT: Good afternoon.

16 Mr. Korzenik, why don't I hear from you with regard to  
17 the motion to quash.

18 MR. KORZENIK: Thanks. I should say, your Honor, I  
19 have not ever appeared before your Honor, but I remember a long  
20 time ago we were adversaries in a case that was probably the  
21 most strange one to you and the most strange one to me, if you  
22 remember the Castle Bono matter, where I think we were  
23 collegial and professional adversaries, and it was a quite long  
24 and unusual case.

25 THE COURT: So does Chief Judge Amon of the Eastern

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1 District. It was the last case she tried as a magistrate.

2 See, you have just dated yourself.

3 MR. KORZENIK: I did. I want that stricken from the  
4 record.

5 Your Honor, we were served, the BBC in New York, with  
6 a subpoena in this case by the plaintiffs. They sought, as  
7 your Honor probably knows, both the copy of a broadcast that we  
8 made entitled Arafat Investigated. It was broadcast in 2003.  
9 They sought outtakes as well, in other words, parts of the  
10 interview of two particular individuals, one Zakaria Zubeidi  
11 and another individual Rumaileh. We objected on journalist  
12 privilege grounds, and we also objected on Rule 45 grounds.  
13 And I want to just basically touch on those two issues, and I  
14 want to talk about -- and I should also mention on  
15 admissibility, but I'm going to raise that as well.

16 There is one case that came down on the admissibility  
17 issue from Judge Weinstein that I'd like to just hand out. We  
18 could not cite it because it was only decided I think well  
19 after all the papers came in. It was November 6 of 2011 and  
20 it's called Gill v. Arabac. It's a similar ATA type claim, but  
21 in that Judge Weinstein decided against the admissibility of  
22 these particular kinds of statements that we think are quite  
23 similar to the thing that Zubeidi and Rumaileh offered.

24 THE COURT: Let me just start right there and see if  
25 we really need to discuss that further. I understand your

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1 argument with regard to admissibility, but this is not an issue  
2 of admissibility. This is not a trial subpoena for --

3 MR. KORZENIK: No, it's not.

4 THE COURT: -- for admissible evidence. This is the  
5 discovery process which is usually governed by a different  
6 standard, that the information sought is either admissible or  
7 may lead to admissible evidence.

8 MR. KORZENIK: I think your Honor is correct. The way  
9 though that I think that it's germane is not so much through  
10 the Rule 45 prong of our discussion, but it does engage the  
11 issues of the privilege. since one of the issue is the degree  
12 of its likely relevance and its value to the plaintiff, and the  
13 degree to which that showing that they make -- if they have  
14 made any showing -- is enough to outweigh the public interest  
15 that the journalists have in developing this information and  
16 preserving it independently. So, I will get into that later.  
17 I consider it a tertiary issue for us.

18 THE COURT: Yes, because it's technically it's not an  
19 admissibility issue. It's an issue as you just described it:  
20 One, whether they have sought relevant evidence, and, two, if  
21 it is relevant evidence, whether that evidence in weighing the  
22 request and whether that evidence can be obtained from a  
23 different source.

24 MR. KORZENIK: From a different source. Now, what is  
25 interesting is there are cases relating to the journalist

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1 privilege where courts have considered the admissibility of the  
2 material. We have cited it in our brief, and your Honor can  
3 see that.

4 THE COURT: I could see that in a trial subpoena  
5 context, if you are subpoenaing material because you say it's  
6 material to be produced as evidence in a trial and, therefore,  
7 you must produce it with or without a witness to be presented  
8 at the trial. I can see the argument then, well, you are not  
9 entitled to have a trial subpoena enforced to obtain any  
10 admissible evidence in a proceeding.

11 I'm he not sure whatever context you say the cases  
12 stand for the proposition that a request, a discovery request  
13 for material, which is not a trial subpoena for admissible  
14 evidence at trial but a discovery subpoena to obtain either  
15 admissible evidence or material that would lead to admissible  
16 evidence, I'm not sure I know of any cases that said if it's  
17 admissible evidence in and of itself it's proper. If it's not  
18 admissible evidence, it's improper.

19 MR. KORZENIK: As to general discovery, that's true,  
20 but in terms of the journalist privilege, it has been in a  
21 number of cases viewed as one of the factors that affects the  
22 weight of the material that the plaintiffs seek.

23 THE COURT: The factors in terms of what? Because it  
24 seems to me, if I'm not simplifying it too much, there are only  
25 two issues: Whether it's relevant, whether it's available from

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1 another source. What is its admissibility --

2 MR. KORZENIK: I was going to say actually while we  
3 typically speak of two prongs for the journalist privilege,  
4 there actually are three. The first one, of course, is what  
5 your Honor related to, its likely relevance and particularized  
6 need as to that, number one. Number two, the reasonable  
7 availability of alternative sources for the information at  
8 issue. And then third there is a balancing that ultimately is  
9 taking place. So that I would say that in these reporter  
10 privilege cases you do at the end, once the showing has been  
11 offered by the party seeking the subpoena -- issuing the  
12 subpoena -- once they have shown relevance and unavailability,  
13 then they still have to show that their showing outweighs the  
14 public interest that the journalists have in their independent  
15 reporting, in their ability to develop the news independently  
16 and without the interference of litigants.

17 So, it does weigh into the balancing factor, and  
18 that's how I think it comes into play. Your Honor is correct  
19 to say that it doesn't affect the first two directly, but it  
20 affects the balancing for sure.

21 THE COURT: And can I put aside, or do we still have  
22 to debate the issue of whether or not you are willing and  
23 prepared to give them what is in fact an authenticated copy of  
24 the document as it has aired? Is that an issue?

25 MR. KORZENIK: That is, in the sense that we have in

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1 the past already given them a copy of the video. They  
2 purchased it through us. We would object to authentication.

3 THE COURT: Well, you object to a representation that  
4 that is in fact responsive to what they asked for?

5 MR. KORZENIK: Well, there is this issue. The thing  
6 that concerns us is, number one, they are looking for outtakes.

7 THE COURT: I am trying to put aside the non-outtake,  
8 because there seems to be some discussion, and didn't see it  
9 being a genuine issue as either side was arguing it. Is there  
10 really some issue with regard to the edited document as it  
11 aired --

12 MR. KORZENIK: As it aired.

13 THE COURT: -- and your providing that to them and  
14 indicating that this is in fact the edited?

15 MR. KORZENIK: Yes, and I'll tell you why. There was  
16 an issue that did come up there. At first we were exploring  
17 the possibility of being able to authenticate simply by an  
18 affidavit, and it became evident that the defense would not  
19 accept that solution, would require our testimony, and we did  
20 not wish to do that.

21 THE COURT: Well, I will ask them whether that's still  
22 from their perspective part of the issue, but forget about what  
23 their position is. Is it a problem for you at this point to  
24 ensure that they have the documentary as it aired, and to  
25 represent to them that in fact you have produced the

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1 documentary as it aired?

2 MR. KORZENIK: As it aired? I would want, your Honor,  
3 to have an opportunity to revisit that. That was something  
4 that we discussed a long time ago.

5 We would, if your Honor wanted us to do so, revisit  
6 it, but we would need to know, one, that we were spared the  
7 risk of having to provide outtakes, spared the risk that we  
8 would have to testify. And if we did not have to testify, and  
9 we simply had to submit an authentication document for the  
10 program itself, then that is something that I would want to  
11 revisit with my clients in London and consider as a resolution.

12 THE COURT: Well, how could I guarantee you that you  
13 wouldn't have to testify as to the authenticity of the  
14 documentary as it aired? I am not even sure any under  
15 circumstances you have that legal right.

16 MR. KORZENIK: That's one of the reasons why we are in  
17 this position where we need to assert both the privilege and  
18 the 45 rule which we think is dispositive --

19 THE COURT: Of the --

20 MR. KORZENIK: -- of all requests.

21 THE COURT: Well, why does the 45 rule have anything  
22 to do with your producing or being willing to produce the -- I  
23 mean I guess I'm trying to practically and reasonably, if I can  
24 start that way, try to figure out what your genuine dispute is  
25 and what you are generally legitimately concerned about.

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1 MR. KORZENIK: Right.

2 THE COURT: It is difficult for me to understand how  
3 you are legitimately and genuinely concerned about producing  
4 the documentary as it aired and indicating that in fact in fact  
5 this is a true copy of the documentary as it aired. I can't  
6 understand in any balancing test why you would be entitled to  
7 protection from being able to do that.

8 MR. KORZENIK: OK. Let me explain. I'll make the  
9 argument, and then you can probe the various elements of it.

10 First, I want to look at Rule 45, because that we  
11 think is the first independent basis for saying that we should  
12 be spared from having to testify or provide an affidavit on  
13 anything that we've done here.

14 Rule 45 is intended of course to protect nonparty  
15 witnesses against the various kinds of burdens that are imposed  
16 by them. That applies whether they are journalists or not.  
17 And the drive behind it seems to be two things: One, to  
18 protect the nonparty witness outside of the jurisdiction from  
19 interference and burden; and then the second part of it seems  
20 to be a drive to protect and honor the comity of the foreign  
21 courts.

22 Now, in this case we don't have a subpoena that was  
23 actually served on the individuals who have knowledge of this  
24 program.

25 THE COURT: That's not necessary.

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1 MR. KORZENIK: No, well, let me --

2 THE COURT: That's absolutely not necessary. You have  
3 to explain to me, just as you would explain to me in a  
4 situation where I said, all right, I understand that someone  
5 gave you Exhibit A, and you are in possession of Exhibit A, I  
6 am serving you with a subpoena to give me a copy of Exhibit A,  
7 and to make yourself available to testify that this is a true  
8 copy of Exhibit A of what you received. You are in New York,  
9 you are a resident of New York, and it would not be a  
10 legitimate argument for you to say I gave Exhibit A to my  
11 brother who took it with him to China.

12 MR. KORZENIK: But that is not what happened here.

13 THE COURT: Well, but, yeah --

14 MR. KORZENIK: That is not what happened here.

15 THE COURT: But if the BBC has and owns this  
16 documentary, I don't understand your argument that simply the  
17 guy who has it in his pocket is the one that's got to be  
18 subpoenaed to turn it over.

19 MR. KORZENIK: OK, well then I want to address that  
20 because that is the distinction.

21 Rule 45, what the plaintiff has done is has cited to  
22 party cases, 30(b)(6) type cases. And when parties are  
23 involved, your Honor is absolutely right, if the court has  
24 jurisdiction over that party, it doesn't really matter where  
25 those documents are held. If they're overseas, it doesn't

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1 matter. If the witnesses who are knowledgeable of those  
2 documents are overseas, it does not matter when you are dealing  
3 with a party or you are dealing with 30(b)(6).

4 But if you are dealing with Rule 45, then there is a  
5 distinction between the parties who have knowledge and the  
6 party who is served.

7 So, there are two groups of cases here. One of them  
8 are cases in which the company is served --

9 THE COURT: Right.

10 MR. KORZENIK: -- but the employees are in another  
11 country.

12 THE COURT: Right.

13 MR. KORZENIK: And there are other group of cases in  
14 which the actual employees who have knowledge and control of  
15 those documents are noticed, served, and there is jurisdiction  
16 over them in this jurisdiction.

17 Now, in the first set of cases --

18 THE COURT: But I'm trying to understand the  
19 distinction you are drawing. You are saying that's relevant as  
20 to the production of the physical material --

21 MR. KORZENIK: Yes.

22 THE COURT: -- or relevant as to the testimony of the  
23 individual?

24 MR. KORZENIK: It's relevant as to both.

25 THE COURT: But wait.

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1 MR. KORZENIK: I will tell you why.

2 THE COURT: Slow down, because I don't understand --  
3 or if I understand your argument -- I don't understand the  
4 legal basis for your argument.

5 If I send a nonparty subpoena to Microsoft for them to  
6 give me a copy of their software, their original software that  
7 they produced to make their original Windows, it would not be  
8 an appropriate response by Bill Gates that I sent the original  
9 over to China, so I'm not giving it to you. You are not  
10 arguing that that would be an appropriate response, are you?

11 MR. KORZENIK: I am arguing that if control over the  
12 document and comity between the UK and the US calls for it,  
13 then the Second Circuit will not require -- in this case you  
14 are giving Microsoft as an example, they are a U.S. company --  
15 but let's assume --

16 THE COURT: But BBC has a presence here in this  
17 District.

18 MR. KORZENIK: But it has a limited one, and I want to  
19 explain what that is. The BBC in the United States has a news  
20 bureau, and it also has a business office in which it probably  
21 does some licensing or advertising, but it has no involvement  
22 with or control over that program. It did not create the  
23 program; it does not control the records for the program.

24 THE COURT: But that's not the case here.

25 MR. KORZENIK: But now --

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1 THE COURT: The case here is that BBC has the control  
2 over this document.

3 MR. KORZENIK: No, the BBC in London has control.

4 THE COURT: When you say in London, is that a  
5 different entity?

6 MR. KORZENIK: It is -- no, it's the same one.

7 THE COURT: All right.

8 MR. KORZENIK: But here, let me give you -- in the  
9 Ings case, the Second Circuit said very clearly -- and this is  
10 an important precedent -- the company was served in the United  
11 States, the subpoena in this case was a subpoena duces tecum  
12 for documents; it was not for deposition but it was under 45.  
13 And the court, Second Circuit, said you may get documents from  
14 this company in New York --

15 THE COURT: Right.

16 MR. KORZENIK: -- and I will modify it so you just get  
17 those documents in New York, but you may not have the documents  
18 from Canada that you seek even though you have jurisdiction  
19 over the company. It said importantly that they quashed  
20 limited to documents in possession of New York agencies of the  
21 banks but not the documents from those banks or their agencies  
22 in Canada.

23 THE COURT: But you are not arguing here -- you are  
24 not reasonably arguing here that there is no copy of this  
25 documentary in the United States or in New York. You are not

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1 arguing that, are you?

2 MR. KORZENIK: I am arguing that the only copy that  
3 exists is the one that I gave to the plaintiff.

4 THE COURT: Then why are we fighting about it here?  
5 Why are we fighting about it again if you have already given it  
6 to the plaintiff?

7 MR. KORZENIK: We're not fighting over that. I gave  
8 it to them.

9 THE COURT: Well, that's my first question. Can I put  
10 that aside and go to the outtakes?

11 MR. KORZENIK: I have given that to them.

12 THE COURT: Because I have to first figure out,  
13 particularly in the context where you want me to weigh the  
14 burdens and the balance of hardships here, I'm trying to figure  
15 out -- I mean is your argument that we don't want to give them  
16 nothing, go away, leave me alone; or is your argument generally  
17 over the outtakes?

18 Because it doesn't seem to me to be a particularly  
19 compelling argument that you shouldn't have to give them a copy  
20 of the documentary that you are in a position to say, yes, to  
21 the best of your knowledge this is the exact copy of the  
22 documentary that aired, if you say you have already given it to  
23 them. I mean you don't have much of a --

24 MR. KORZENIK: I have already given that to them.

25 THE COURT: All right.

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1 MR. KORZENIK: And then the question about our  
2 offering up an affidavit was an effort to compromise the  
3 result.

4 THE COURT: Are you still willing to compromise that  
5 issue?

6 MR. KORZENIK: We would be willing to do that.

7 THE COURT: So, in what way?

8 MR. KORZENIK: As long as -- in other words --

9 THE COURT: What is the compromise?

10 MR. KORZENIK: I want to run to the privilege now and  
11 I want you to understand what the stakes are for us here,  
12 because I don't want your Honor to think it is purely an issue  
13 of just a procedural thing and, hey, leave us alone.

14 THE COURT: Yes, because the privilege has nothing to  
15 do with the documentary as it aired, because that's not a  
16 discussion I intended to spend even this much time on.

17 MR. KORZENIK: I tell you how it does. I am going to  
18 ask your Honor to indulge this discussion. The law that would  
19 apply in the UK, if they sought this material there, and the  
20 law that I think is instructive here, is a -- and it also  
21 illustrates very well the kind of interest that journalists  
22 have in war reporting, conflict zone reporting, which is much,  
23 much more serious than many other settings in which journalists  
24 do their work. Many journalists are killed when they cover war  
25 zones for a variety of reasons. In the Randal case, an

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1 important case involving the Washington Post, they were called  
2 upon to testify in front of the War Crimes Tribunal in Europe  
3 related to Bosnia, Herzegovina and Serbia and the war crimes  
4 there. Jon Randal was the reporter, he covered some of the war  
5 crimes events, and the prosecution wanted him to testify and to  
6 provide his outtakes, provide his articles, and to testify to  
7 the truth of the articles that were published and also to  
8 testify as to outtakes and other things that he got. A  
9 sympathetic plaintiff, one that on a lot of levels one would  
10 want to assist.

11 And I will say this, I was on a panel on the  
12 reporter's privilege at Brooklyn Law School discussing just  
13 this issue. Adam Liptek put that case out there, and he said  
14 what do you do in that case? The answer is what those  
15 journalists did, what Randal did to get that story out of that  
16 war zone was very important. The prosecutors, the rest of the  
17 world would not have known of those war crimes but for the risk  
18 to which those journalists and Randal put themselves.

19 If war journalists -- not just BBC but others -- are  
20 seen to testify, are seen to provide evidence for private  
21 litigants, or for prosecutors and so on, they will be  
22 understood in those difficult places when the war gets tough,  
23 when the war gets intense, and where parties are violent, they  
24 will be seen as delivering evidence for parties and for  
25 prosecutors later on, and they will be more at risk, and the

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1 story will be less likely to get out.

2 THE COURT: I know, but that's -- I understand your  
3 argument, and we are moving into the outtake part of the  
4 argument. That's your argument as to the reporter himself --

5 MR. KORZENIK: So --

6 THE COURT: -- and that's your argument as to  
7 reporting. That is not an independent argument in any case law  
8 that exists in the United States that says that alone prevents  
9 any party from getting a copy of the documentary that's already  
10 publically aired, and who they get that documentary from makes  
11 some representation that it is what it purports to be in  
12 response to the subpoena. There is absolutely no case law that  
13 says that the BBC would be protected from that.

14 If you say, yeah, you shouldn't have to produce the  
15 reporter, maybe you're right, it's not necessary to produce.  
16 But there is no case law --

17 MR. KORZENIK: Your Honor.

18 THE COURT: -- that says that if I write a newspaper  
19 article in The New York Times tomorrow, and everybody reads it  
20 tomorrow, and then the next day there is a lawsuit going on and  
21 someone says, you know, it's important for me to have a  
22 complete, accurate copy of the article that you wrote  
23 yesterday, and so I have a trial next week so I'm asking you,  
24 The New York Times, to give me a copy of that article and to  
25 assure me that that's an accurate copy of the article. There

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1 would be no protection against that under any of the case law  
2 that you cited.

3 MR. KORZENIK: In the ones that I have litigated,  
4 sometimes a court will order that and sometimes they will not.

5 THE COURT: But there is no legal blanket protection  
6 for the organization itself that has possession of something  
7 that has already been publicly aired to somehow not produce  
8 that because they are somehow protecting what? I don't know  
9 what they are protecting.

10 MR. KORZENIK: Understand that when the journalist  
11 offers up an affidavit or offers up testimony --

12 THE COURT: Nobody asked your journalist to offer up  
13 an affidavit.

14 MR. KORZENIK: I thought that's what you were asking  
15 me.

16 THE COURT: No, I never mentioned your journalist. I  
17 said is the BBC prepared to produce a copy of the documentary  
18 that's already been aired, with a representation by the BBC, an  
19 appropriate representation that this is in fact a true copy of  
20 the documentary that aired. That has nothing to do with the  
21 reporter.

22 MR. KORZENIK: The answer to it is yes with  
23 qualification. Understand, your Honor, please, that when we do  
24 something like that it does compromise our position because we  
25 are being asked to provide validation and to be a witness for a

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1 particular party in a particular case. And I don't think that  
2 people in war zones or people who are partisans in those  
3 settings are able to make the distinction that you and I are  
4 able to make.

5 THE COURT: But we're not here discussing about  
6 whether you are going to be a witness in a proceeding. We  
7 haven't had that conversation. Nobody has forced either your  
8 reporter or your non-reporter. No court has even decided or  
9 addressed the question of whether you would have to produce  
10 somebody at a trial.

11 The only question is they asked you for the  
12 documentary. You say that, one, you already turned it over to  
13 them -- so I don't know what the big deal is -- and I assume  
14 you turned it over to them under circumstance which you  
15 intended to make them rely upon the fact that what they asked  
16 you for, that what you gave them was responsive to that.

17 MR. KORZENIK: Right, I understand what your Honor is  
18 saying.

19 THE COURT: I don't see why the BBC would have any  
20 hesitancy to say, yes, this is the program as it aired, and we  
21 are producing it to them, and we are assuring you that, yes,  
22 this is an accurate copy of what aired.

23 Now, whether or not they want you to do that at a  
24 trial, and whether or not you want to oppose a trial subpoena  
25 to testify about the documentary, that doesn't seem to be the

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1 issue at this point.

2 MR. KORZENIK: Let's do this. I am most concerned  
3 about outtakes --

4 THE COURT: Right.

5 MR. KORZENIK: -- and your Honor should be aware we  
6 did sort of talk about that kind of thing. We are still  
7 fearful and concerned about what even the stepping forward of  
8 that sort would do. But we understand that it is less  
9 problematic.

10 THE COURT: It's more than less problematic. That's  
11 not what the case law --

12 MR. KORZENIK: Remember, once we open the door to it,  
13 then the other argument is, well, once you provided an  
14 affidavit to this, why don't you provide an affidavit as to the  
15 outtakes, or what was is in or not in.

16 THE COURT: Maybe, maybe not. I mean you may have the  
17 same or different argument to make with regard to that, but  
18 this isn't a slippery slope argument.

19 The question is what you are really entitled to  
20 withhold --

21 MR. KORZENIK: Right.

22 THE COURT: -- and what they are legally entitled to  
23 obtain.

24 MR. KORZENIK: Well, we are actually --

25 THE COURT: It's clear to me that they are legally

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1 entitled to obtain a copy of the aired documentary. You would  
2 agree with that? You don't have any case law that says that  
3 they're not legally entitled to a copy of the aired documentary  
4 if it had relevant information in it that might be admissible  
5 or lead to admissible evidence.

6 MR. KORZENIK: I'm not going to say that's necessarily  
7 so. We sold it to them because it was at the time generally  
8 available to people.

9 THE COURT: Right. So, you have no legal argument to  
10 say that you could give it generally available to everybody but  
11 them. I mean that wouldn't be your argument.

12 MR. KORZENIK: Right. I would ask your Honor as to  
13 that point, let's bracket that, because I don't want to lose a  
14 lot of the discussion time with your Honor on that.

15 THE COURT: All right.

16 MR. KORZENIK: So, you understand that we did raise  
17 it, we did consider it. There is an issue then about, well,  
18 what happens later if the defendant doesn't accept that, are we  
19 then in for more.

20 THE COURT: I don't know the answer to that question,  
21 nor at this stage do I care about the answer to that question,  
22 nor do I think anything that I'm saying here is determinative  
23 of that question. But you can understand that I will give you  
24 this much, that if you have already turned it over to them and  
25 told them that this is in fact what you asked for, you are in

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1 no better position to argue that there is some prejudice to you  
2 to have to supply somebody to do that than you were when you  
3 originally produced the original document.

4 MR. KORZENIK: Remember, if we're in a series of door  
5 openings that become perilous to our most guarded and concerned  
6 position, then I would feel there is something at stake. I  
7 would like to go to this, and then I'm going to walk away from  
8 the program itself.

9 Rule 45 still has great restrictions on what a court  
10 can do with employees of any third party nonparty.

11 THE COURT: There is no subpoena against any of your  
12 employees.

13 MR. KORZENIK: None.

14 THE COURT: None. None of your employees have been  
15 ordered to do anything. That's the BBC's responsibility to  
16 figure out who they want to physically respond to their  
17 obligation to respond to the subpoena.

18 MR. KORZENIK: Right. Understand this. There aren't  
19 --

20 THE COURT: You telling me the guy who does this is in  
21 China, so I can't do it for you, that's not an appropriate  
22 response.

23 MR. KORZENIK: You are thinking what I thought as  
24 well, which is we all think 30(b)(6) -- we all think that if a  
25 corporation has a presence here, then they are subject to the

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1 power of the court.

2 THE COURT: I understand.

3 MR. KORZENIK: And that is not true.

4 THE COURT: I agree with you, it's not a 30(b)(6)  
5 determination. It's a corporate entity determination.

6 MR. KORZENIK: You're saying if the corporation is  
7 subject to jurisdiction then it doesn't matter where --

8 THE COURT: No, I'm saying if the corporation is  
9 validly served with a subpoena, and they have --

10 MR. KORZENIK: -- jurisdiction over them.

11 THE COURT: No, I didn't think that was an issue. You  
12 are not saying that the BBC doesn't have an obligation to  
13 respond to subpoenas unless the subpoena is specifically to the  
14 mail guy who holds the mail. That's not what you are saying.

15 MR. KORZENIK: No, we are saying we have to respond to  
16 the subpoena but, we do not have to -- Rule 45, if you look at  
17 the NML case, there was in that case -- so, first off look at  
18 the Ings case, Ings v. Ferguson. Second circuit says subpoena  
19 duces tecum served on a company over whom the court has  
20 jurisdiction in this country, because of comity we are not  
21 going to compel production of documents controlled by that  
22 company overseas; we are not going to permit the production of  
23 the Canadian documents. If you want to take the documents from  
24 this bank that are in New York, you can do that, but if you  
25 want documents held --

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1 THE COURT: That's kind of an artificial distinction  
2 you are trying to draw. You are saying to me that the only  
3 copy of the documentary that exists is outside of the United  
4 States? That's not what you are arguing.

5 MR. KORZENIK: The only copy of the outtakes now.

6 THE COURT: I am not talking about the outtakes. You  
7 are talking about a blanket Rule 45 rule that says -- and  
8 you're citing these cases for the proposition not for outtakes.  
9 These cases have nothing to do with outtakes.

10 MR. KORZENIK: Your Honor, I can't get a documentary  
11 from the New York office of the BBC; they don't hold this  
12 stuff. They are a news bureau that reports about events --

13 THE COURT: So, you're saying determinative of where  
14 this documentary is, that's determinative of whether you should  
15 have an obligation to produce it?

16 MR. KORZENIK: Yes. Because, for example, the Hague  
17 Convention speaks about Hague-identified witnesses and  
18 documents. In this case when they served the BBC, they knew  
19 that this program had been taped and recorded in the West Bank.

20 THE COURT: But it's in control of the BBC.

21 MR. KORZENIK: It's not in --

22 THE COURT: The BBC has it.

23 MR. KORZENIK: The fact that the BBC has it does not  
24 mean that a court has the power to require an overseas employee  
25 of the BBC to generate a document, because those are the only

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1 ones --

2 THE COURT: No, because you see that's where your  
3 argument fails. Nobody is requiring an overseas employee to do  
4 anything.

5 MR. KORZENIK: That's correct.

6 THE COURT: The subpoena requires the BBC to respond  
7 and produce the physical evidence in their possession.

8 MR. KORZENIK: No.

9 THE COURT: Now your argument is coming back and  
10 saying I'm not going to produce it, or I can't produce it  
11 because most of the copies are kept in --

12 MR. KORZENIK: Not most of them. All of them.

13 THE COURT: Well, I assume you have a copy here in  
14 your office.

15 MR. KORZENIK: That's correct.

16 THE COURT: All right. Well, I guess that's not the  
17 answer.

18 MR. KORZENIK: I am talking about whether the BBC  
19 does. But more importantly --

20 THE COURT: But the BBC does. They gave it to you.  
21 You are the BBC; you are their lawyer.

22 MR. KORZENIK: But just remember in their subpoena and  
23 in what they would require to authenticate it, they couldn't  
24 have me authenticate it. They could not have --

25 THE COURT: Then maybe it won't be admissible. I

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1 don't know.

2 MR. KORZENIK: No, there is nobody in the United  
3 States who has the kind of knowledge that would have the  
4 foundation for that kind of authentication.

5 THE COURT: Well, when you say that kind of  
6 authentication, the problem is that you are trying to use an  
7 admissibility standard at trial, and I'm not addressing that.

8 MR. KORZENIK: No, that's not --

9 THE COURT: No, wait. We are engaged in lawyer talk  
10 here. If I had 12 people sitting here, and I asked them to  
11 figure out what the problem is, they will say, oh, the problem  
12 is very simple, these people got the tape, they just don't want  
13 to turn it over. That's what it comes down to.

14 MR. KORZENIK: No, it is not that simple.

15 THE COURT: It is that simple, because you might have  
16 it with you now, and you don't want to turn it over.

17 MR. KORZENIK: I don't. Your Honor --

18 THE COURT: I mean, you know, but that wouldn't make a  
19 difference in terms of your argument.

20 MR. KORZENIK: I already gave them a copy of it.

21 THE COURT: All right. So, what are we fighting  
22 about?

23 MR. KORZENIK: We are fighting about whether --

24 THE COURT: So, you are not fighting about whether or  
25 not you should be entitled to withhold a copy of the

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1 documentary from them.

2 MR. KORZENIK: No.

3 THE COURT: OK.

4 MR. KORZENIK: I'm not.

5 THE COURT: Because you can't legitimately make that  
6 argument.

7 MR. KORZENIK: I'm not, and I didn't.

8 THE COURT: No stretch of credulity could make that  
9 argument, because you have already given them a copy. So,  
10 that's not the issue. The issue is not whether or not they  
11 should be in possession of an accurate copy of what aired in  
12 terms of the documentary. Right? That's not the issue.

13 MR. KORZENIK: Right. So, now the question is --

14 THE COURT: So, I assume in your producing it to them  
15 you have at least represented to them that it is in fact what  
16 you purport it to be. Right?

17 MR. KORZENIK: I can't say that I actually said that,  
18 but I sold it to them.

19 THE COURT: But I assume if that's what you produced  
20 in response to their request, that's what you intended.

21 MR. KORZENIK: I understand what your Honor is trying  
22 to say, but I want your Honor to understand this one feature of  
23 Rule 45, which is not artificial, it is not simply procedural.  
24 When Rule 45 says that it is not going to compel the foreign  
25 employees of a nonparty to generate evidence or to provide

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1 material, it does so for good and sound policy reason; it does  
2 so because it is saying those people, whether it's in Italy, in  
3 London, wherever they may be, they live under a different  
4 regimen, a different legal system with different privileges.

5 THE COURT: They who?

6 MR. KORZENIK: The reporters and the people in the  
7 BBC, the employees in the offices of the BBC in London.

8 THE COURT: Why are they even relevant to this?

9 MR. KORZENIK: Because they are the ones --

10 THE COURT: Nobody is requiring them to do anything.  
11 Nobody has asked the reporter to do anything with regard to the  
12 original documentary. Nobody has asked any employee in England  
13 to generate some document. Their only request is it's  
14 probably -- you know what I should say to them when they get  
15 up, is, look, why don't you just go down to the corner store  
16 and buy yourself a copy, because I'm sure there are copies of  
17 the documentary somewhere in New York that you could probably  
18 purchase just like, you know, PBS has --

19 MR. KORZENIK: Right. We have not opposed that. What  
20 I'm saying is that those people in the BBC in London live under  
21 the protections of certain privileges.

22 THE COURT: Which people? Which person are we  
23 protecting?

24 MR. KORZENIK: The people who --

25 THE COURT: Who?

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1 MR. KORZENIK: The reporter Jeremy Bowen.

2 THE COURT: Nobody has asked the reporter to do a  
3 thing.

4 MR. KORZENIK: The people who --

5 THE COURT: Wait a minute. Let's stop. I assume the  
6 reporter is not the one who has custody and control of BBC's  
7 documentary.

8 MR. KORZENIK: Yes. And let's get to that next point.  
9 The people who --

10 THE COURT: The reporter is the one who has custody  
11 and control of the BBC documentary?

12 MR. KORZENIK: No, no. I was about to go to the next  
13 step.

14 THE COURT: Well, all right. Well, then --

15 MR. KORZENIK: The people who have custody and control  
16 over it are British subjects and are people in London.

17 THE COURT: No, they are employees of BBC.

18 MR. KORZENIK: That's correct, they are employees of  
19 the BBC.

20 THE COURT: Oh, OK. Let's go past that argument,  
21 because, you know, I think it's such an artificial argument  
22 that you should not be able to produce a copy of the aired -- I  
23 mean, you know, the reality is the BBC can take the copy that  
24 they gave you, put it in a copy machine, copy it and give them  
25 a copy and say this is the copy, which in fact pretty much you

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1 have told me you have already done.

2 So, to make a lawyer's argument that the thing you  
3 have already done without a problem is somehow a problem for  
4 you, and somehow the law says that you are not supposed to  
5 respond to this subpoena --

6 MR. KORZENIK: But your Honor -- well, look, no, no,  
7 no. Your Honor is actually making a broader point. You are  
8 saying that since you gave them a copy of it, you should also  
9 now provide an affidavit.

10 THE COURT: No, I'm saying the same reasons you gave  
11 him the copy of it before, I assume without objection, are the  
12 same reasons you should have no objection to giving them a copy  
13 now. The only argument you are making is that I shouldn't have  
14 to produce somebody who assures them that what I gave them is  
15 in fact what I purport it to be.

16 MR. KORZENIK: Sure, I will give them another copy.  
17 That's not an issue here.

18 THE COURT: I assume that that's not the issue. You  
19 made it the issue. You said that somehow some of these cases  
20 say that you have protection from giving them a copy, and  
21 somehow you have protection from telling them that this is in  
22 fact what is responsive to your request.

23 MR. KORZENIK: Right. I am -- here is what I'm  
24 objecting to. I am saying that if the custodian of those  
25 records -- the person who has the kind of knowledge that will

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1 allow the authentication that your Honor is talking about --  
2 resides in London, then the privileges that apply to people in  
3 London should be permitted to apply to them. They should be  
4 able to invoke those privileges when they are brought to the  
5 fore in a British court, and that's what the comity feature of  
6 45 is about.

7 THE COURT: I know, but that doesn't -- I mean, look,  
8 if I was going to fashion a more creative solution to this  
9 problem than I think is warranted here, I would simply say to  
10 you tell your client here in New York to get a copy, and let  
11 that client indicate the process in an affidavit that they went  
12 through to get that, so that that affidavit will be a  
13 reasonable assurance that they in fact got the true copy and  
14 that you are in fact turning over a copy that you purport it to  
15 be. That has nothing to do with a British citizen. OK?

16 Now, if he wants to say this is the copy, this is the  
17 true copy, I have seen it myself, I have seen it before, it's  
18 the copy that I saw when it aired; or I called my guy in  
19 London, he sent me a copy, I got the copy from him, he assured  
20 me that this was the accurate copy that we aired, and your  
21 person here in New York turned that over, tell me what rule  
22 that violates.

23 MR. KORZENIK: It probably is something that neither  
24 the plaintiff nor the defendant would go along with.

25 THE COURT: Well, that's their problem; that's not

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1 your problem. But that wouldn't violate any rule that you are  
2 citing to me.

3 MR. KORZENIK: I tried to work out some compromise  
4 along those lines, your Honor. I am not trying to resist that.

5 THE COURT: Well, I'm just trying to figure out  
6 whether a compromise is necessary other than a logical legal  
7 approach to this.

8 It doesn't seem to me that you have any legal basis to  
9 say that if the BBC is subpoenaed here in New York, that you  
10 don't have an obligation to produce the documentary, unless you  
11 have some other argument. You have a separate argument with  
12 regard to the outtakes that apply to the documentary. And you  
13 don't have any legal argument to say that the person who was  
14 given that assignment here in New York to get a copy of the  
15 videotape, produce it back to you so you can give it to them,  
16 if that person verifies what he did to obtain a true copy, and  
17 that is sufficient to assure us that it is a true copy, I don't  
18 know of any legal argument you have that somehow foreign law,  
19 you know, controls it.

20 MR. KORZENIK: But look at what your Honor is doing.  
21 And I appreciate what your Honor is doing to try to work around  
22 it, but understand that Rule 45 has policy justification for  
23 what it is doing. And I would ask you to look and consider  
24 these cases.

25 In the Price Waterhouse case, for example, the company

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1 is subpoenaed, seeks documents only, and they are UK-located  
2 documents. The court did not want to allow those UK documents  
3 of a U.S.-based jurisdiction company to be turned over unless,  
4 it turned out, they said we will allow it in this case because  
5 a British court in a related case said that it waived its legal  
6 interest and said the U.S. has greater interest in this fact,  
7 these issues, than we do.

8 THE COURT: What is the British law that you say is in  
9 conflict with you turning over the documentary? Is there a  
10 British law that you can cite to me?

11 MR. KORZENIK: Yes. The British have their own press  
12 privilege.

13 THE COURT: Well, what's --

14 MR. KORZENIK: They have their own take on the press  
15 privilege. It's not exactly the same as our own.

16 THE COURT: So, what part of their press privilege  
17 conflicts with your obligation here to give them a copy of the  
18 aired documentary?

19 MR. KORZENIK: The Randal case.

20 THE COURT: And which law stands for the proposition  
21 that you don't have to turn over --

22 I assume you are not making the argument if this was a  
23 British lawsuit in London that if someone said let's go  
24 subpoena the BBC and get a copy of the tape that aired, that  
25 you would quote me some British law that would protect them

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1 from something to turn over that copy.

2 MR. KORZENIK: What I am citing is Rule 45, that  
3 protects foreign employees from discovery burdens, whether they  
4 be testimony, or production, or authentication of documents.  
5 It protects those people, those employees, even if their  
6 company resides here and the court has jurisdiction over their  
7 company. That is something I can't conceive because I don't  
8 believe that that's what the law is.

9 THE COURT: So, why did you turn over the documentary  
10 in the first place? What rule did you violate? You violated  
11 Rule 45 when you turned over the original documentary?

12 MR. KORZENIK: No, because Rule 45 protects me, but I  
13 chose to produce that. I chose to produce that at the outset  
14 in order to try to come to a resolution. Because, remember --

15 THE COURT: Well, wouldn't you have at least waived  
16 that argument?

17 MR. KORZENIK: No, because what happened --

18 THE COURT: Did you condition that production on some  
19 preservation of some argument that you could get it back?

20 MR. KORZENIK: No, because I chose to take a position  
21 where I thought that my position was reasonable. I mean keep  
22 in mind --

23 THE COURT: So, why are you taking a different  
24 reasonable or unreasonable position here?

25 MR. KORZENIK: Because I'm taking the view that I'm

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1 happy to provide it, and I understand that I might be compelled  
2 to do it; I might be able to resist it, but I'm not going to  
3 try to do that.

4 Remember, when these subpoenas hit, the first thing  
5 that I do as a press lawyer is to call the other side, and as  
6 part of our obligation under the rule, before we make a motion  
7 to quash, all right, what are you looking for? Can you narrow  
8 this? Can you open this? Can you, etc.? What can we do to  
9 resolve this? And sometimes just to get the ball rolling, to  
10 try to get things resolved, you say, OK, you need a copy, here  
11 is a copy.

12 THE COURT: OK. But as I look at the subpoena, why  
13 isn't the simple statement about the documentary as it aired,  
14 that part of the subpoena, why isn't your simple response to  
15 that part of the subpoena that seeks a copy of the documentary  
16 that aired, why isn't your simple response to that simply that  
17 it is moot because I have already turned it over to them? Why  
18 isn't that just the end of that conversation with regard to  
19 producing the documentary as it aired?

20 MR. KORZENIK: I mean I did it, and I will do it again  
21 if need be.

22 THE COURT: But I mean isn't that moot at this point?

23 MR. KORZENIK: Yeah.

24 THE COURT: I mean there is no debate about whether  
25 you should turn over or not turn over --

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1 MR. KORZENIK: -- the documentary.

2 THE COURT: Right. They subpoenaed it. Your response  
3 is I already gave it to you, right?

4 MR. KORZENIK: I would say I already gave it to you,  
5 and you bought it and --

6 THE COURT: Well, that part of the subpoena need not  
7 be enforced, right?

8 MR. KORZENIK: Correct.

9 THE COURT: We don't need to be arguing about that  
10 part of the subpoena.

11 MR. KORZENIK: That's correct.

12 THE COURT: Because you have already given it to them.  
13 They are asking for something that you have already produced to  
14 them.

15 MR. KORZENIK: Correct.

16 THE COURT: OK. Now we can put aside the authenticity  
17 part of it for now, but then let's go to the outtakes.

18 You know, I assume your primary argument about the  
19 outtake -- well, you see, you had two arguments. With regard  
20 to the general standing of considering the relevance and  
21 whether or not it's available through another source -- and why  
22 don't I just quote it specifically. They have to show that the  
23 materials at issue are of likely relevance to a significant  
24 issue in the case and are not reasonably obtainable from other  
25 available sources. That's primarily what I am focused on.

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1           Now, the other issues in terms of the balancing of the  
2           interests, and I give you -- clearly if the only thing that I  
3           am considering is whether or not this nonconfidential material,  
4           that there are compelling reasons that journalists who were  
5           doing their job in dangerous situations, and journalists in  
6           general, the presumption should be that they are not doing this  
7           in anticipation of individual parties in litigation, and should  
8           not be dragged into that, and there are compelling reasons why  
9           the press should have a free opportunity to do what job the  
10          press does independent of people's individual interests and not  
11          be used in that manner. So, I understand that argument.

12           But I am not sure you make a compelling argument that  
13          what they seek is not likely relevant to a significant issue in  
14          this case. They seek information showing the connection  
15          between these two individuals and the organizations and the  
16          defendants.

17           MR. KORZENIK: OK.

18           THE COURT: And that's clearly relevant. That  
19          information is clearly relevant to a significant issue in this  
20          case. I want to first find out whether you have some  
21          compelling argument to make that that's not relevant to this  
22          case.

23           MR. KORZENIK: I do, and let me --

24           THE COURT: -- Because it seems to me your primary  
25          argument is based on that they could get it from someplace else

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1 and that you have a compelling privilege interest.

2 MR. KORZENIK: I do want to address that, because when  
3 a party comes into court and says that they want materials that  
4 are subject to the qualified privilege, they have to make some  
5 kind of showing that it's important, not just that it might be  
6 helpful. In other words, it's not that vague. What you have  
7 here is normally, and in most of these cases -- certainly those  
8 that I have seen and those that are reported in the cases --  
9 usually have some kind of video clip, or outtake, or interview  
10 that really relates to the event that is specifically at issue  
11 in the case.

12 In this case you have outtakes which the plaintiffs  
13 themselves told magistrate Judge Ellis, well, we don't know  
14 what's in them, and Judge Ellis acknowledged and understood in  
15 the colloquy that they don't know what is contained in it; in  
16 fact, this stuff could be quite unhelpful. Because when you  
17 look at the transcript and you see what it is these two people  
18 are saying, it's highly ambiguous stuff. They are kind of  
19 talking about their relationship with Arafat in a way that kind  
20 of both suggests that they're extorting him, using their  
21 leverage, boasting that they are kind of tough guys who can  
22 sort of force him to give them accommodations of various kinds.

23 Remember -- and we will go into more about what they  
24 say. These guys --

25 THE COURT: Are you talking about the outtakes or are

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1 you talking about what aired?

2 MR. KORZENIK: No, I am talking about both -- if you  
3 see what aired, you can see that it's ambiguous, and you can  
4 also see that the plaintiffs say, well, we don't know what's in  
5 them, we have no idea what's in them.

6 THE COURT: Well, no, they don't say that.

7 MR. KORZENIK: They do.

8 THE COURT: They say we don't know what's in there.  
9 But given the fact that the parts you aired were specific  
10 references to their relationship to the PLO and the Palistinian  
11 Authority and Yasser Arafat and the other organizations at  
12 issue, given what they said on the tape, their argument is that  
13 there is likely to be more of that kind of conversation on the  
14 outtakes.

15 MR. KORZENIK: Well, but let me just emphasize  
16 something very important, your Honor. They say -- and they  
17 said in the hearing -- that they don't know. Now, that's  
18 pretty unusual.

19 THE COURT: They don't know --

20 MR. KORZENIK: They don't know what's in those.

21 THE COURT: Well, that's not unusual at all. That's  
22 not unusual at all.

23 MR. KORZENIK: No, that's not unusual in this --

24 THE COURT: In most cases they are going to know  
25 what's in the documentary but they are not going to know what's

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1 in the outtake.

2 MR. KORZENIK: No, I disagree with that. In most  
3 cases that I have litigated, or those that I have seen and  
4 taught, the stuff that is sought in outtakes is more obviously  
5 known. In other words, for example, there may be -- as in the  
6 Gonzales case -- you have videotapes of reporters being stopped  
7 by a particular police officer, and there are more videotapes  
8 of more stops, and those show his modus operandi.

9 THE COURT: But there is nothing in those cases that  
10 say that the party subpoenaing the information were aware of  
11 exactly what was in the outtake. In most cases that's not the  
12 case.

13 MR. KORZENIK: But in most cases they do know what the  
14 outtakes are about. They know that the camera was in X place,  
15 and they know it was recording certain events at a baseball  
16 game as to an accident that occurred, etc.

17 When the party comes into court, and the court is  
18 willing to simply say "could be," well, then that privilege is  
19 diminished by that standard.

20 THE COURT: But, see, it's also controlled by what  
21 you -- how you want to argue its content. It makes it a whole  
22 lot easier obviously if we were sitting here and you were  
23 saying to me, Judge, the relevant information they want is the  
24 information that shows the connection between these individuals  
25 and these entities. There is no such further information in

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1 the outtakes that's relevant to that.

2 MR. KORZENIK: I would emphasize this: When a party  
3 comes to a journalist and says we want to see your outtakes  
4 because there could be stuff in there that could be helpful to  
5 us, then you are talking about a sifting case. You are talking  
6 about a party, a litigant, coming to the journalist and saying  
7 we want to go through your files to see if there is anything in  
8 there that could be helpful to our case. And when parties do  
9 that, as here, where they said -- this is the word they used --  
10 they have no idea what is contained in those outtakes, when a  
11 party comes in with "no idea" about what is contained in those  
12 outtakes beyond the kind of speculation that there must be more  
13 of the same, that is not the grounds under which a court should  
14 allow them now to go through the journalist's files and sift  
15 through those outtakes to see if there is something that might  
16 be helpful to them. If that's what the privilege does, it's  
17 not much of a privilege. But remember --

18 THE COURT: No, but it focuses on the information, not  
19 on the general outtakes.

20 The question really is is that we know that the  
21 significant issue is whether or not there is a connection on  
22 the documentary. There are specific statements that  
23 specifically talk about a connection.

24 MR. KORZENIK: But, your Honor --

25 THE COURT: The only thing that they have articulated

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1 that they are interested in is not what they had for lunch that  
2 day but whether or not -- they want the further evidence in the  
3 outtakes that would reflect that connection.

4 MR. KORZENIK: Here is something interesting.

5 THE COURT: So --

6 MR. KORZENIK: At the very beginning when they were  
7 asked -- not in the beginning but later on in the case they  
8 were putting in a witness list, they didn't include these  
9 witnesses or these tapes. So, in their own mind this is not  
10 important.

11 THE COURT: Well, I can't say --

12 MR. KORZENIK: Well, I mean that says something about  
13 the way they regarded it. And keep in mind they even asked us,  
14 well, is there anything in there that is bad for us.

15 They had no idea. What they said is absolutely  
16 correct. If a privilege is broken by that kind of speculation,  
17 or by that kind of hope, then it is a pretty weak privilege.  
18 And the problem that journalists are facing is that there are  
19 two ways to read these two prongs. One of them is the way that  
20 we are now discussing, about saying, well, if there is a  
21 speculative thing, based on what the show had, there could be  
22 more of the same, and we want to see if that exists. You will  
23 see in other cases there really are more grounds for saying  
24 that they know what those outtakes are before they take them.

25 So, I ask your Honor not to allow that privilege to be

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1 broken so easily. So that's my first concern about it. It's  
2 troubling weak from the point of view of the press in a lot of  
3 ways, and it's because of that kind of reading that  
4 occasionally it provides not the kind of protection that is  
5 deeply, deeply needed. So, that goes as to the first prong.

6 I would also ask you to consider the thoughtful  
7 analysis of our expert Dr. Sayigh, who has been an expert who  
8 has advised the State Department, the World Bank, the Rand  
9 Corporation, Council on Foreign Relations on the Middle East,  
10 and was involved in the Middle East peace process himself, so  
11 he really knows the different parties and what the  
12 relationships are and the complexity of the relationship  
13 between the two.

14 And he really illustrates I think very clearly, if you  
15 would take a closer look at his affidavit because it's very  
16 instructive both as to the second prong but also as to what it  
17 is that these particular witnesses are saying. Their kind of  
18 swagger about what they do, who they are and what they can do  
19 to Arafat is very empty. And remember this is --

20 THE COURT: But that's not a determination for you, or  
21 I, or him to make. That's a credibility issue for a jury to  
22 determine if there is a trial.

23 MR. KORZENIK: Because it goes to the --

24 THE COURT: You think that even his opinion on this  
25 would be admissible evidence to demonstrate that what they are

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1 really saying, they're simply bragging out of thin air and are  
2 not really talking about a genuine connection? He is not in a  
3 position to testify to that.

4 MR. KORZENIK: Yes, it is, and I'll tell you why. I  
5 am talking about the first prong now. If we are in the  
6 business of speculating what might be in that --

7 THE COURT: But we're not in that business. That's  
8 the whole point. You want me to speculate on the other side,  
9 and you want me to argue we're not in the business of --

10 MR. KORZENIK: I don't want that speculation, but if  
11 we look at some other things about those people, you are  
12 talking about a guy, Zubaiddi, who before he gave up and was  
13 given amnesty by the Israelis, and was doing theater, and  
14 before he was imprisoned by the PA -- I mean this is another  
15 thing that's remarkable about it, and again it relates to the  
16 second prong, so I want to stay on the first.

17 If we are speculating about what those things contain,  
18 then it is worth looking over what Sayigh says. You are  
19 dealing with a guy who was adverse to the PA in a lot of  
20 different ways, and his people arrested and kidnapped a PA  
21 mayor from Jenin.

22 THE COURT: But you see, you know what's inconsistent  
23 with that -- I mean I have not had an opportunity to review the  
24 entire documentary, but that's not even the way your reporter  
25 reports it. OK? Your reporter doesn't say, oh, look, we're

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1 going to have this guy talk about how he is real connected and  
2 he is taking orders for Arafat but, by the way, he is really  
3 just fooling around, it's not true.

4 You didn't even present the story that way. Your  
5 expert is now saying something the opposite of the impression  
6 that you were trying to give the public when you -- that's not  
7 the thrust of that documentary.

8 MR. KORZENIK: I want to correct something. That's  
9 important. No.

10 THE COURT: The documentary says -- you have the guy  
11 quoted as saying on the documentary that there is no difference  
12 between Fatah and the Al-Aksa Martyrs' Brigade. You don't say  
13 that -- you don't have your guy, expert, come right on after  
14 and say, you know, he is only kidding. That's --

15 MR. KORZENIK: No, the kidnapping was reported in the  
16 documentary. But there is something more important, your  
17 Honor. It's a mistake if what one thinks is that this  
18 documentary shows that there is some connection between Al-Aksa  
19 and --

20 THE COURT: How do you know?

21 MR. KORZENIK: What the documentary was doing was  
22 Arafat Investigated, it was looking at him at the time that he  
23 was held captive in his headquarters in Ramallah by the U.S.  
24 and by Israel. And what it was doing, it was polling, it was  
25 talking to Palestinian people, a variety of different people

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1 about what do you think about Arafat. It wasn't sort of trying  
2 to establish some particular thing; it was just interviewing  
3 people about --

4 THE COURT: But it was making the point that Arafat  
5 was the person in charge giving these people orders.

6 MR. KORZENIK: No, it was an interview. No, you have  
7 to read the transcript to see what it was doing. It just  
8 interviews these guys, and they talk about what they do and  
9 what they think of Arafat.

10 THE COURT: All right.

11 MR. KORZENIK: But it is -- in other words, the  
12 documentary --

13 THE COURT: And the edited portions that were  
14 presented were people saying they were taking orders from  
15 Arafat.

16 MR. KORZENIK: No, it does not speak about orders from  
17 Arafat; it just talks about what they were doing and what they  
18 think of Arafat.

19 THE COURT: Well, now that's a mischaracterization,  
20 even the quotes that I have.

21 MR. KORZENIK: Well, that's how they --

22 THE COURT: Who is in charge of both of these two  
23 parts of the organization? Is it Arafat? And Rumaileh says  
24 Yasser Arafat. And you don't come behind that and say, well,  
25 but we have an expert who says he is really kidding.

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1 MR. KORZENIK: But what I'm saying is this. The  
2 report says in context what it says.

3 THE COURT: Right.

4 MR. KORZENIK: I'm not asking to alter that.

5 THE COURT: Well, you are asking to alter that. Now  
6 you are putting up an expert to try to argue that these guys  
7 really weren't -- they were really adverse to Arafat, really  
8 were trying to undermine him and --

9 MR. KORZENIK: Absolutely not. That's not why I  
10 raised it. What I was talking about is what does it say is  
11 that they say they have no idea what the outtakes contain, and  
12 they admit that. And I'm just saying that if we're going to  
13 allow speculation on the outtake to be the basis for breaking  
14 the privilege, that's an unfair disadvantage to the journalist,  
15 and it would not be a fair way to read this privilege.

16 THE COURT: OK.

17 MR. KORZENIK: I then was pointing to Sayigh simply to  
18 say that if one is trying to look at other things to speculate  
19 about what might be in or might not be in those things, I would  
20 point out to take a look at what he says. I think they would  
21 suggest that the outtakes are probably not informative.

22 But the more important thing is the plaintiff says  
23 they have no idea what it contains. And when people say they  
24 have no idea what it contains, it doesn't appear in their  
25 witness list, then that shows what they think the outtakes

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1 contain, and that privilege has not been broken.

2 THE COURT: We all know to some extent what it  
3 contains. It contains further conversations between these two  
4 witnesses and your journalist with regard to the activities  
5 that were the subject of this interview.

6 MR. KORZENIK: Keep in mind, it could qualify and  
7 compromise the stuff that was there. And you know what, if --

8 THE COURT: It could.

9 MR. KORZENIK: -- and if the PA was looking for this  
10 stuff, we'd be resisting them too.

11 THE COURT: I understand that.

12 MR. KORZENIK: So, again, I want to leave this with  
13 the simple point that you should not be able to break this  
14 prong of this privilege by saying you have no idea what's  
15 contained, because that's wrong. Some particularized need  
16 should be shown, and that's what the case law says. You don't  
17 just come in and say there could be something that might be  
18 better for us there. That's the first one.

19 Now I want to look at the second, because then you are  
20 getting into a sifting, sifting through our files to find out  
21 if there is something good there. That's not fair, that's  
22 wrong, and that's not what the privilege is about.

23 The second prong is the issue about whether the same  
24 information is reasonably obtainable from other sources. Now,  
25 this is a particularly significant prong of the test. It's

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1 hard to really understand how if you are talking about the  
2 relationship between Al-Aksa and the PLO during this particular  
3 period of time, how that is something that is so rarefied that  
4 only a few people on the earth would know about it, and the  
5 only thing that really captures what they know about it is this  
6 BBC interview.

7 One of the things that hurts the journalists who  
8 assert the privilege is that sometimes courts will say, oh,  
9 well, you can't get that video anywhere else but from the  
10 person who took the video, so therefore we need that video.

11 THE COURT: I don't see it that way. The question is  
12 not whether or not you can get the video from someplace else;  
13 the question is whether or not you can get the information --

14 MR. KORZENIK: Precisely.

15 THE COURT: -- from somewhere else.

16 MR. KORZENIK: And that's what the Second Circuit does  
17 in Grocco, and that's what Judge Jones recognized I think  
18 correctly and wisely in Grant, that you have to be talking  
19 about the information.

20 So here is where I think there are some very important  
21 things to be noted from -- and your Honor knows this litigation  
22 in terms of what's going on within it more than I do. But, for  
23 example, Zubaidi was for a period of at least a year in custody  
24 of the PA, and during that time the plaintiff seemed never to  
25 have bothered to have required of them or asked them for a

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1 deposition of Mr. Zubaidi while he was held in their custody.

2 THE COURT: Well, again, you know, I mean I can't  
3 speculate about that either. I don't know what you mean by in  
4 their custody, but we know that he was not within the subpoena  
5 power of this court. Now, whether or not he was someone who  
6 was an employee of the PLO and didn't have the same kind of  
7 protections that your British subjects had is a different  
8 question.

9 MR. KORZENIK: He was in indeterminate detention. I  
10 would just ask that your Honor take a close look at the Sayigh  
11 affidavit, because the latter part of it deals with the  
12 alternative sources. If there is anything that this expert  
13 knows, it's how you could show what the relationship is between  
14 Al-Aksa and the PLO.

15 THE COURT: But your argument is a little different.  
16 Your argument is not a direct argument that the information is  
17 available to the plaintiff someplace else. Your argument is  
18 that, well, they didn't do anything to see if they could get  
19 it.

20 MR. KORZENIK: Oh, no, my argument --

21 THE COURT: You have no basis to argue or to state  
22 that in fact they could have gotten this information directly  
23 from this witness.

24 (Continued on next page)

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1 MR. KORZENIK: Well, I want to say that I was pointing  
2 really more to the other sources, and I want to review the five  
3 other -- at least five other important sources for this kind of  
4 information. But it is also true that, I must say, I'm -- for  
5 people who are trying to get to break our privilege on the  
6 basis of saying they have no alternative grounds, there are --  
7 they -- it seems to me that they have done surprisingly little  
8 to try to make a case by other means than news clips and news  
9 reports.

10 THE COURT: Their efforts are not the question. What  
11 the question is whether or not I can affirmatively say the  
12 information is available to them to have --

13 MR. KORZENIK: By other means.

14 THE COURT: -- by another means.

15 MR. KORZENIK: Okay.

16 THE COURT: Now, simply saying that these witnesses  
17 were in the custody of the PLO gives me not a strong record to  
18 say that they could have squeezed this information out of this  
19 witness.

20 MR. KORZENIK: Just remember, the PLO and the PA are  
21 parties in this case.

22 THE COURT: I understand.

23 MR. KORZENIK: And if they don't provide stuff, they  
24 are subject to preclusion orders and all kinds of things that  
25 this Court has.

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1 THE COURT: How would I -- If these witnesses would  
2 not testify, how would I conclude inter-sanctions against the  
3 defendants in this case because this individual, who you say  
4 was in their custody, decided he wasn't going to make himself  
5 available for a deposition or answer questions by the  
6 plaintiff? Do you think it's reasonable for me to conclude  
7 that somehow that would be the PLO's fault or somehow they  
8 could have gotten it anyway?

9 MR. KORZENIK: Well, it's their fault if they don't  
10 provide information or depositions and other kinds of  
11 documents.

12 THE COURT: Whose fault?

13 MR. KORZENIK: It would be the PA's fault.

14 THE COURT: But I don't have that record.

15 MR. KORZENIK: I think that those things are germane,  
16 but I want to just go through the sources of information  
17 that --

18 THE COURT: Okay.

19 MR. KORZENIK: -- are there and that -- whether  
20 they've exploited them or not, I don't know, but they are  
21 there.

22 THE COURT: Okay.

23 MR. KORZENIK: And Dr. Sayigh --

24 THE COURT: Well, you have to tell me that the  
25 information is there.

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1 MR. KORZENIK: The information is there, correct.

2 THE COURT: So where else do you say that they get  
3 this information?

4 MR. KORZENIK: The Israel defense forces seized the  
5 headquarters of the PLO in Ramallah and, at that time, they  
6 seized documents from the PLO headquarters and specifically  
7 from Arafat, and they took those documents. This was in 2002  
8 under Operation Defensive Shield. They took those documents,  
9 and they put many of those documents up on the Internet. They  
10 had others, and those are available and could be subpoenaed or  
11 drawn from --

12 THE COURT: And what do those documents say that is  
13 material to the issue that we're talking about?

14 MR. KORZENIK: Umm.

15 THE COURT: Do we know?

16 MR. KORZENIK: I want to -- I just want to be very  
17 clear before I go further. As to what they did or what they  
18 didn't do with them, I don't know, but one thing that's very  
19 important and what Magistrate Ellis did that is a serious  
20 mistake is that the way he described it was that he was  
21 granting this modified subpoena. First, he says Rule 45 bars  
22 any testimony from these people. Then he says Rule 45, though,  
23 still he can modify it and make the overseas people provide --

24 THE COURT: I understand.

25 MR. KORZENIK: -- witness statements. I think there's

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1 an inconsistency there. But he also makes another error that's  
2 actually more troubling for the press from a reporter's  
3 privilege point of view, and he says we failed to meet our  
4 burden of showing that this was burdensome for us.

5 THE COURT: That's not your burden.

6 MR. KORZENIK: We have no burden.

7 THE COURT: I understand.

8 MR. KORZENIK: And the burden is already -- the  
9 privilege relieves us of that burden. It says it's their  
10 burden to show, one, that it's relevant; and, two, that there's  
11 no other alternative sources.

12 Now, I'm coming forward with Sayigh to show that there  
13 are alternative sources. They never really addressed this  
14 issue except in very conclusory kinds of ways, and we're coming  
15 forward with statements from -- there are statements from  
16 Palestinians who were held in Israeli custody --

17 THE COURT: Are you still talking about Israeli sealed  
18 documents, or are you going on to something else?

19 MR. KORZENIK: No, I'm going on to something else.

20 THE COURT: You said Israeli sealed documents.

21 MR. KORZENIK: They're not sealed documents. They're  
22 seized.

23 THE COURT: I'm sorry, seized.

24 MR. KORZENIK: Seized documents.

25 THE COURT: And you said those are the first sources.

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1 MR. KORZENIK: Correct.

2 THE COURT: And what else do you say?

3 MR. KORZENIK: The other, and I'm just going to open  
4 up his --

5 THE COURT: You said you were going to give me five.

6 MR. KORZENIK: I'm going to give you five, but there's  
7 more.

8 THE COURT: I want to organize them.

9 MR. KORZENIK: There's more -- Sayigh's. Oh, here  
10 they are.

11 THE COURT: If you want me to seize on that, don't you  
12 have to tell me what it is? Where do you say there's available  
13 evidence that indicates the connection between these  
14 individuals, these entities, and the PLO?

15 MR. KORZENIK: The IDF took the position, and also the  
16 website of the Israeli Security Agency, that's another source,  
17 took the position that there was such a link.

18 THE COURT: Okay.

19 MR. KORZENIK: And they both wrote about it and  
20 documented it, to the best of what -- with ample documents on  
21 that website, as well, and they have a trove of documents.  
22 They got thousands and thousands of documents out of that, and  
23 documents speak more effectively than anything that someone may  
24 say.

25 THE COURT: Well, not all of those thousands of

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1 documents address this issue.

2 MR. KORZENIK: No, but they were looking for that type  
3 of document. In other words, remember, that that's what  
4 they -- they came to -- they took a view about it. They -- I'm  
5 just saying, those documents are there. They're significant.  
6 They used those documents, the Security Agency, to make  
7 precisely that point.

8 THE COURT: Okay.

9 MR. KORZENIK: So those documents are there, made  
10 public and revealed by the Security Agency. That's true also  
11 about the IDF, in terms of its putting up those materials,  
12 other materials as well.

13 Then there are statements and judicial proceedings in  
14 Israel that involve Palestinians, who were involved in  
15 terrorist activities or Al-Aqsa-related activities. They are  
16 in custody of the Israeli government, and they are also legal  
17 proceedings in which there are indictments, documents, the  
18 usual kind of stuff that we have in our courtrooms when there  
19 are criminal courts in criminal cases.

20 So all of that stuff is also there to demonstrate  
21 those kinds of things. And one of the people in custody is one  
22 of the people who is accused and who was convicted of killing  
23 one of the plaintiffs in this case. So that person is in  
24 custody. In principle, one has access to them to take  
25 deposition. In principle, one can get the documents from that

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1 case.

2 THE COURT: Why do I assume that?

3 MR. KORZENIK: Well, because that is -- I mean, I  
4 don't -- Look, you're saying that I can't speculate on why they  
5 didn't get something.

6 THE COURT: Well, you are saying that they're  
7 available to be deposed, and I'm not so sure it's as easy as  
8 you would put it.

9 MR. KORZENIK: Remember, it's their showing.

10 THE COURT: I understand that, but you've given me a  
11 logical argument why they can't make the showing. And you said  
12 that they have to make -- that these witnesses are readily  
13 available to them for them to squeeze this information out of  
14 them as witnesses.

15 MR. KORZENIK: Look, it's totally possible that the  
16 Israeli government is not comfortable with the case, okay? And  
17 doesn't want to cooperate with them. I don't really know.

18 THE COURT: I don't know. I don't know whether the  
19 Israeli government, the witnesses themselves, I mean --

20 MR. KORZENIK: What I'm saying is --

21 THE COURT: I'm just saying --

22 MR. KORZENIK: We're talking about something that  
23 involves a lot of human beings not just Mr. Zubaidi and  
24 Mr. Rumaileh.

25 THE COURT: I know, but part of your argument that is

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1 not as persuasive as the other part is, don't -- Your argument  
2 isn't particularly persuasive to tell me where you think they  
3 ought to look to find this information. Your argument is most  
4 persuasive where you can say, look, Judge, X document clearly  
5 says what it is that they say they want to prove.

6 MR. KORZENIK: And you know what --

7 THE COURT: So it's clearly there --

8 MR. KORZENIK: Right.

9 THE COURT: -- in this document.

10 MR. KORZENIK: And they refer to some of those  
11 documents in their papers.

12 THE COURT: I know.

13 MR. KORZENIK: So they're mindful of it. The stuff is  
14 on the Internet. Some of the stuff is available from the  
15 government sources. We know you can get material from the  
16 government. I'm not saying that there aren't obstacles. I'm  
17 not saying they have to use some shoe leather for it.

18 THE COURT: I understand, but to the extent that  
19 you're saying that they have pointed to -- or you have pointed  
20 to instances where these -- there's evidence of this specific  
21 issue of this link --

22 MR. KORZENIK: Right.

23 THE COURT: -- it is available to them from those  
24 sources, and they don't have to get it from your source.

25 MR. KORZENIK: From us, right.

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1 THE COURT: But that can't be the speculation that  
2 there's a guy out there who ought to know, so why don't they  
3 chase him and see if they can get it from him.

4 MR. KORZENIK: No, there's --

5 THE COURT: There's got to be X said it, you know,  
6 this time and place. They have X who said it. They already  
7 have that information or this document contains that  
8 information. They already have that information in this  
9 document. So they don't need it from me.

10 It can't be that 10,000 documents and they should look  
11 in there first, or there are a whole bunch of witnesses and  
12 they should see whether they can get it out of them first.  
13 That's not the argument.

14 MR. KORZENIK: I can't tell them what to do, but the  
15 burden is on them to show that they can't get it. They can't  
16 just shrug and say, eh, can't get it, and then the privilege is  
17 broken. They need to be able to show that they really can't.  
18 Now, I'm putting out there, through Sayigh --

19 THE COURT: The first argument they make that they  
20 can't is that there's no evidence that it's someplace else,  
21 that they have --

22 MR. KORZENIK: Well, let me say this.

23 THE COURT: -- that they have somebody who's already  
24 said it that they should use instead, or that they already have  
25 some documents that reflect that, that they can get from

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1 someplace else. It's not the speculation about whether it  
2 might be there.

3 MR. KORZENIK: Yeah, but you have to ask the really  
4 serious question. If this case turns on -- is made on press  
5 material, they say they have something more, but if this case  
6 is based on press material, they don't have a case.

7 THE COURT: Well, but they're not -- their argument  
8 would be, it's not based on press material. It's based on the  
9 individual admissions of the people who are directly involved  
10 who happen to have been interviewed by a reporter, and then if  
11 I did --

12 MR. KORZENIK: The real question is -- Okay.

13 THE COURT: If I get on the 6:00 news and confess to  
14 six murders, it could be pretty powerful evidence against me  
15 that I made a public confession --

16 MR. KORZENIK: It could be.

17 THE COURT: -- about issues that are in dispute in the  
18 trial.

19 MR. KORZENIK: It's not -- Look, I don't know how  
20 probative that stuff is, and your Honor says we don't know.

21 THE COURT: I don't either.

22 MR. KORZENIK: We step away from it. It doesn't look  
23 particularly probative to me.

24 THE COURT: If the guy says, I'm taking orders from  
25 Arafat, that's at least relevant to a jury's determination as

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1 to whether that's reflective of the actuality or if it means  
2 something different.

3 MR. KORZENIK: But, look, the issue is, is the  
4 information there by other means, and what I've done is I've  
5 just simply said, I don't know why they haven't done anything.  
6 It doesn't look to me as if they've done very much. I'm not  
7 asking your Honor to look at their failures. Their failures  
8 perplex me. But if --

9 THE COURT: Well, it's easier to get it from you than  
10 to get it from someplace else.

11 MR. KORZENIK: Well, of course. You just do armchair  
12 litigation.

13 THE COURT: It's right there in admission.

14 MR. KORZENIK: Yeah, you watch your TV set. That's  
15 what all plaintiffs do with us. That's how it operates, and --

16 THE COURT: Some get it and some don't.

17 MR. KORZENIK: And most of the time they don't, it  
18 depends, but it varies. But, again, I would say here, the  
19 stakes for us are urgent, and our people are faced with serious  
20 risk themselves. As much as they say that they face some risk  
21 in going to talk to these people, we face risk, too, when the  
22 war zone heats up and we have to send our people in to risky  
23 territory. We don't have that choice.

24 right now, in the West Bank, and during the past three  
25 years of this litigation, there has been very low risk within

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1 those areas. Mr. Zubaidi is interviewed by Haaretz, the  
2 Israeli newspaper. He's doing theater. He's gotten amnesty.  
3 The Israelis are letting him go to a political conference in  
4 2009. Then they're giving him permission to go get an eye  
5 operation. All of those things are well documented. He's not  
6 a problem for them.

7 They say they have a lawyer who got threatened, and  
8 that he was threatened with murder. He was not -- Read what he  
9 said. You can't conclude that from that. And the reality is,  
10 they can get the PA's assistance to do this, and Israel  
11 controls access.

12 THE COURT: Well, the PA is not -- it's not their  
13 co-counsel here. They have competing interests. So, you know,  
14 I mean, it's not a very compelling argument to say that the PLO  
15 is going to go out of their way to help the plaintiffs prove  
16 the case against them.

17 MR. KORZENIK: Not to prove it, but to produce  
18 documents and people and -- Look, on Rumaileh, Rumaileh is an  
19 officer. If they don't produce him, then I don't get what's  
20 going on. In other words, they have an arsenal of devices that  
21 litigation gives you --

22 THE COURT: Right.

23 MR. KORZENIK: -- and that allows you to go beyond the  
24 press clips and the press reports that first alert us to issues  
25 that we all should be sensitive to.

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1 THE COURT: But I don't think that you want me to  
2 assume that somehow it's less dangerous for them to seek this  
3 information than it is for your reporters to do their  
4 reporting.

5 MR. KORZENIK: Let's assume that it's equally  
6 dangerous. The real question is, should the reporters'  
7 predicament be enhanced when in a committee -- and I ask that  
8 you look also at the submission of Reporters Without Borders,  
9 who are very much like a group we're more familiar with in the  
10 United States, Committee to Protect Journalists, and the UN  
11 statements, and a number of other things. Let's just talk  
12 about the increasing number of deaths among war reporters and  
13 conflict zone reporters.

14 THE COURT: You don't have to convince me of that  
15 issue in the abstract.

16 MR. KORZENIK: And what I'm saying is that when we go  
17 into a war zone or a conflict zone, and we attach ourselves to  
18 courts and become witnesses, our risk is enhanced. There's  
19 just no question about it. Our ability -- and assume there's  
20 no risk. Assume that the risk is to be put aside, we still  
21 aren't going to get that story. And people need that story.  
22 They need it about what happens in those war zones.

23 Now, so again, I'd ask that your Honor keep in mind,  
24 while I'm coming forward with Sayigh, it's not my burden to  
25 show that there's alternative stuff, but interestingly enough,

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1 Magistrate Judge Ellis doesn't really talk at all about prong  
2 No. 2. He doesn't talk about alternative sources. He just  
3 assumes, and just conclusorily says it is. And you know why?  
4 Because they don't really offer very much themselves. The  
5 plaintiff offers nothing in terms of why there are no other  
6 sources except to talk about the Heideman affidavit and the  
7 difficulty of getting to Zubaidi.

8 But that's -- Zubaidi, there are tons of other sources  
9 of information about a matter of broad concern that involves a  
10 lot of people including the IDF, the Israeli government,  
11 Israeli prosecutors and so on. So you've got tons of  
12 documents. You have Israeli Security Agency that I've cited,  
13 depositions of Palestinians in -- held by Israel, including the  
14 ones involved in the 2004 shooting and -- or bombing. And even  
15 more, if you look at Sayigh's things, he gives more detail  
16 about what's just out there generally about what the  
17 connections are or possible connections are between the Al-Aqsa  
18 Brigade and the PLO and Fatah.

19 So I would -- again, would simply ask that your Honor  
20 keep true to what I fear Magistrate Ellis did not, and that is,  
21 whose burden is it? And what is it? It seems to me your Honor  
22 does recognize it's about information. It's not about an  
23 outtake, and the Grecco holding is correct. But even when it  
24 comes to the first prong, as well, the burden is on them to  
25 show some kind of particularized need, and they've not done

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1 that. And the burden was put on us and unfairly so.

2 I would then just ask your Honor to give consideration  
3 to the fact that, though the privilege speaks of two prongs, it  
4 does involve, ultimately, at the end of the day, taking the  
5 showing that the plaintiff has made, or the requesting party  
6 has made of the two issues, the two prongs, and show that that  
7 showing outweighs the public interest, that the journalists and  
8 the public have in getting this information out of places that  
9 the public really needs to understand what's going on.

10 And if they're correct about the relation between  
11 Al-Aqsa and the PLO, people need to know about that, and the  
12 avenues need to be opened to allow reporters to get that news  
13 out to people. And it should not be staunched by this kind  
14 of --

15 THE COURT: The way you phrase it, I can't agree with  
16 you. I don't think the balancing test is whether or not it  
17 outweighs the public interest to know. The question is, is the  
18 public will have the interest to know, and it clearly doesn't  
19 outweigh that, but the question is, is whether or not it shows  
20 that and it has a negative effect on that.

21 MR. KORZENIK: Correct. Whether it has that impact,  
22 and whether the showing -- at least the cases I've seen talks  
23 about whether the showing and -- put forth by the requesting  
24 party is sufficiently strong to overwhelm that, that privilege.

25 So again, the privilege is in peril if it's seen --

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1 the two prongs are read in that weakened way. And I  
2 respectfully request that the Court see those prongs as being  
3 true burdens that the plaintiff or the requesting party must  
4 meet so that the privilege is not broken, and the interests  
5 that are -- we -- public interest that we're trying to protect  
6 are in place and secured.

7 THE COURT: Thank you. Let me hear from Mr. Schoen.

8 MR. SCHOEN: Your Honor, David Schoen. I don't have a  
9 great deal to add, frankly, to the discussion, with all due  
10 respect to Mr. Korzenik. I'll just touch on a couple of  
11 things.

12 I was struck at the time when Mr. Korzenik said, well,  
13 what we have here, the documentary itself -- and I was careful  
14 to listen to that -- the documentary itself is ambiguous, at  
15 best, and the Court took Mr. Korzenik to task on that  
16 immediately, frankly, and grabbed the part that I was going to  
17 grab. And it may just be that Mr. Korzenik is not clear on  
18 what it is we want to prove or seek to prove or need to prove  
19 on this point, but it bears repeating.

20 There is nothing ambiguous about but there is no  
21 difference between Fatah and Al-Aqsa Martyrs' Brigade. That's  
22 the central point we seek to prove through this documentary and  
23 the taking of orders from Arafat. That's what's clear here.

24 And with all due respect, again, maybe, and I'm sure  
25 it is because he said so, Mr. Korzenik's view that documents

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1 speak louder than words, I respectfully disagree. And it's our  
2 showing that we're going to make, that the leaders of these  
3 organizations say that there is no difference between them is  
4 much better than just about anything else we could get, and  
5 we're entitled to put on the best that we can get. There is no  
6 substitute or duplicate for that.

7 And by the way, it bears pointing out -- and again  
8 Mr. Korzenik would have no way of knowing this -- the PA  
9 doesn't concede that Al-Aqsa and Fatah are the same because, as  
10 Mr. Korzenik I'm sure does know from the papers, and we can  
11 prove money going to Fatah, and we believe we can prove Fatah  
12 and Al-Aqsa are the same, and that's one variety of material  
13 support that we intend to prove in our case.

14 THE COURT: Well, I don't want to jump the gun on  
15 either issue, but let me -- I will start backwards because, as  
16 I started the conversation that I think seems to be the more  
17 central issue is, you articulate very well what it is you want  
18 to prove and the different pieces of evidence that you want to  
19 use to prove that. But if you have all these available ways to  
20 prove that, then why is isn't it readily available, from a --  
21 reasonably obtainable from other available sources?

22 MR. SCHOEN: First of all, as your Honor pointed out,  
23 what we heard from Mr. Korzenik and his expert, not that there  
24 are documents that establish that Al-Aqsa and Fatah are the  
25 same, we believe it's clear they're the same, and the world

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1 should know that, but the PA denies it.

2 THE COURT: Yes, but you believe that based on the  
3 evidence that you've amassed that you believe will be  
4 persuasive to a jury.

5 MR. SCHOEN: None of which -- I'm sorry, your Honor.

6 THE COURT: Go ahead.

7 MR. SCHOEN: None of which is like the leaders of  
8 those organizations telling us.

9 THE COURT: I know, but you don't --

10 MR. SCHOEN: That's why it's not an alternative. It's  
11 not an alternative if it's not as good.

12 THE COURT: Well, let's put it this way. I assume  
13 that your position has always been, and my best understanding  
14 of the nature of your evidence so far and what you anticipate  
15 it being, that your position is pretty much that even without  
16 this documentary, that you have enough evidence to prove that  
17 connection.

18 MR. SCHOEN: I don't know. I don't know, Judge.

19 THE COURT: Well, I think you believe that.

20 MR. SCHOEN: I hope it. I hope it.

21 THE COURT: And I can at least point to -- and you  
22 just -- we've already talked about some examples. But there  
23 are these various other sources of proof that you have  
24 available to you that you intend to present to a jury that you  
25 believe will prove that point, those connections.

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1           And so the real question, which remains -- and, quite  
2 frankly, I'm not sure -- I mean, you have a double-edged sword.  
3 It helps you in one sense to quote this language in the  
4 documentary, but the reality is, that's just further evidence  
5 that you have it without the outtake. You have the same right  
6 on the documentary.

7           MR. SCHOEN: Oh, yes.

8           THE COURT: You want to show the money transactions,  
9 you want to show the other connections. You may have other  
10 witnesses who are going to testify to that connection, and on  
11 top of that, you've got these guys on TV, in a documentary that  
12 everybody has seen, where it's a direct statement that they  
13 have that connection.

14          MR. SCHOEN: Yes, your Honor.

15          THE COURT: How does that make the outtakes another  
16 source of information that's not available to you when they  
17 just admitted it on the documentary?

18          MR. SCHOEN: Great point. I don't know that we will  
19 find anything in the outtakes that is as good as that. The  
20 outtakes are independently relevant, different reasons. We  
21 made here -- We say in the papers, we made here the argument,  
22 especially since Mr. Korzenik has said two or three times the  
23 outtakes may not be helpful. They may compromise your case.  
24 They may hurt your case. That may be the PA over there making  
25 that argument.

CBJPSOK2

1 I'd like to have a complete record of what happened  
2 and the PA might be arguing, well, all we have are what's here,  
3 the outtakes available, they had other interviews -- sorry if  
4 I'm talking too fast -- maybe they undercut what's in there.  
5 So that's one reason we want the outtakes and to put them into  
6 context.

7 THE COURT: But that would be -- That is a more  
8 compelling argument outside the context of the journalist's  
9 privilege because if you wanted -- I might be more inclined to  
10 give you such a fishing expedition if you thought that there  
11 might be some evidence someplace that you wanted to pursue to  
12 see if there was something there.

13 But the standard here is not, well, you get to fish  
14 into their outtakes to see if there's something there that's  
15 going to be helpful to you. It's that you've got to make a  
16 showing that the information they have in the outtakes is  
17 likely relevant to the significant issue that you've raised and  
18 that's not available from a different source.

19 You must admit that there is -- the material that you  
20 want to use, the point that you want to make is available from  
21 different sources. That would be true, right?

22 MR. SCHOEN: Around the margins. Not this directly,  
23 not -- I don't believe --

24 THE COURT: You say not this directly. When you say  
25 "not this directly," you're referring to what you already have.

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1 MR. SCHOEN: From the documentary, I hear you. I hear  
2 you, Judge, absolutely.

3 THE COURT: You have to say not this directly as is  
4 represented in the outtakes, and you're not in a position to  
5 say that.

6 MR. SCHOEN: Let's focus on the outtakes, your Honor.  
7 You're right. You're right. You're right.

8 THE COURT: If I would assume anything, I would assume  
9 that the stronger evidence that you have is in the documentary,  
10 and that there's no reason to believe that there's something  
11 stronger than those direct statements that you have in the  
12 documentary in the outtakes.

13 MR. SCHOEN: I wouldn't go so far as to say no  
14 stronger, but I think the Court makes --

15 THE COURT: Well, articulate for me what you think is  
16 likely, you know, obtainable in the outtakes that's stronger  
17 than their direct admission in the documentary that there's  
18 such a connection.

19 MR. SCHOEN: Your Honor, I don't have any basis for  
20 saying it's likely that it's stronger. I don't think that's my  
21 requirement either, though, for a couple of reasons. One, I  
22 gave the independent reason or reasons that the outtakes are  
23 important. But, two, if we were talking here about  
24 confidential materials, No. 1, I think we would have a  
25 different inquiry. Of course we would have a different

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1 inquiry, and especially on this prong.

2 But, No. 2, it's not a fishing expedition for the very  
3 reason -- first of all, for the very reason that your Honor  
4 pointed out, it's not a fishing expedition. We have what's on  
5 the documentary already. So we know this isn't a random  
6 conversation about who's going to win between Notre Dame and  
7 U.S.C. this week. It's not about that. It's about this  
8 subject. It's about Arafat. It's about Al-Aqsa Martyrs'  
9 Brigade.

10 THE COURT: But beyond that, you have no idea if  
11 there's any other statement in this -- in these outtakes that  
12 is relevant evidence that might lead one to the conclusion that  
13 you want them to reach --

14 MR. SCHOEN: I think we have --

15 THE COURT: -- other than surmising that by the nature  
16 of the statements that are already in the document.

17 MR. SCHOEN: I think your Honor has hit on one central  
18 point. Again, I disagree with Mr. Korzenik, but respect his  
19 experience and knowledge. In my experience, which I'm sure  
20 pales compared to Mr. Korzenik's, it is not a question that  
21 people know what's in the outtakes when they see the outtakes.  
22 They know what we know. We know what the subject matter was.

23 But like in this Chevron case that Judge Kaplan had,  
24 it's found at 2010 U.S. District Lexis 47034, May of 2010. In  
25 that case, they didn't know what was in the outtakes, but they

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1 had ample reason to believe it by the nature of the documentary  
2 that was made, and that was enough in that case. And they also  
3 had to deal with the counter-interests that the documentary  
4 filmmaker had because this was -- in that case, it was directed  
5 to him, the subpoena. It was directed to the documentary  
6 filmmaker.

7 Or in the Cutler case, which is another good case, and  
8 I don't think either of these are in our brief, by the way, but  
9 the Cutler case is 6 F.3d 67. It's another good case on the  
10 outtakes, but in terms of knowing what they are, Cutler makes  
11 an important point, your Honor -- Maybe this is a compromise,  
12 but it makes an important point. Where the court is inclined  
13 not to give the outtakes -- I hope that's not where we are, but  
14 if the Court were inclined, in that case the Court ought to  
15 look at the outtakes in camera. That's what Cutler says.

16 In Cutler it arose in the reverse way. They said,  
17 well should the court look at them -- The news agency said the  
18 court ought to take a look at them before they gave them over,  
19 and Judge Platt said -- I'm not usually make a practice -- I  
20 don't usually make a practice of quoting Judge Platt -- but in  
21 any event, Judge Platt said in that case that that's not the  
22 way it works and if -- you know, if I'm not inclined to give  
23 them, then we turn it over, but anyway --

24 THE COURT: Well, you know, some of your language is  
25 straightforward and candid, seems to not directly address the

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1 standard here. You said that you should have this because the  
2 transcript of the documentary, the transcript of the  
3 documentary contains statements directly probative of this  
4 issue by Ata Abu Rumaileh and Zakaria Zubaidi, i.e. that Fatah  
5 and Al-Aqsa are, in fact, one and the same, and that all of  
6 their activities are directed by Yasser Arafat.

7 Now, that, obviously, you're quoting directly the  
8 language that we just went through about they make those direct  
9 statements. But then you say, "based on these probative  
10 statements, the chances that the outtakes contain additional  
11 support for plaintiff's theory of liability are extremely  
12 high." That's not the strongest argument to make on this kind  
13 of an issue.

14 MR. SCHOEN: But when you don't --

15 THE COURT: It's not a question of what the chances  
16 are. It's not a question of whether or not you can get  
17 additional information. Additional means you already have it.  
18 All right? So that doesn't bode well for an argument that  
19 somehow it's not reasonably obtainable from a different source.  
20 You just say you already had it. You're looking for additional  
21 information. That's consistent with the direct admissions that  
22 you say these individuals are making.

23 And, you know, the words like "chances are" are not  
24 any argument that, in fact, that you know the out -- or you  
25 have something other than this logic, you have some other

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1 reason to believe that there is more material -- that the  
2 material -- that the information inside the outtakes will give  
3 you something that you don't already have. That's really --  
4 that's my inquiry.

5 I don't see where you are -- you believe the outtakes  
6 are going to give you something different than you already  
7 have.

8 MR. SCHOEN: I'll give you an example.

9 THE COURT: At best, it sounds cumulative. If, you  
10 know -- When you say, well, they directly said it; so there  
11 must be some additional stuff and the chances are there's  
12 something else said here that's consistent with that, that's  
13 the argument that I hear.

14 MR. SCHOEN: It's possible, your Honor. But let me  
15 give you an example. It's possible that in the outtakes,  
16 speaking freely, they give evidence that supports that Al-Aqsa  
17 and Fatah are the same. Beyond that, they talk about  
18 logistics, they talk about how the setup works and so on, and  
19 that's the kind of thing in my view, respectfully, that this  
20 Chevron case is about. In Chevron it was about -- it was  
21 against Chevron for tearing up the rainforests in Ecuador and  
22 that sort of thing, and they knew that the documentary was  
23 about that --

24 THE COURT: Right.

25 MR. SCHOEN: -- and they sought additional information

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1 related to that. And the Court said, well, there's ample  
2 reason to believe that's what the document was about this and  
3 who it was commissioned by, that relevant --

4 THE COURT: In Chevron, they didn't have a Chevron  
5 official on TV already admitting it. They were denying it.

6 MR. SCHOEN: Well, Judge --

7 THE COURT: This witness you have on the documentary,  
8 on the portion that you already have, readily says exactly what  
9 you want him to say. What makes you think he's going to say  
10 something else that's more powerful than the direct statement  
11 that he takes orders from Arafat, and they're all one in the  
12 same?

13 MR. SCHOEN: Judge, it's a terrific point on that  
14 point, if that were the only thing that we know is relevant to  
15 this case from that documentary. But, again, they may discuss  
16 how the two organizations operate together. They might discuss  
17 specific attacks, Al-Aqsa, Fatah engaged in, which from other  
18 sources then we would know this is also attributed to Fatah,  
19 now we know it's Al-Aqsa. Again, these are non-confidential  
20 materials we're talking about.

21 It's a question of having a smoking gun, if you want  
22 to call it. Something that puts us in the room with this stuff  
23 that tells us reason to believe here that these outtakes might  
24 have something relevant to the relationship between Al-Aqsa and  
25 Fatah, with the relationship of both of those to the PLO and PA

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1 with taking orders from Arafat.

2 THE COURT: Even in that regard, given the nature of  
3 these general representations about this interview and the  
4 outtakes included, that -- and what you know about this case,  
5 there's no reason to believe that these individuals are talking  
6 about any one of the instances that are at issue here. Right?

7 MR. SCHOEN: Can I point you to any particular reason  
8 I have, other than the fact that they know about the incidents  
9 here?

10 THE COURT: Well, I'm saying -- I'm not talking about  
11 the evidence in general because, remember, we're not talking  
12 about -- the only thing you're talking about is you want to  
13 hear further what statements these two individuals made about  
14 the relationship. You know, they could be lying. They could  
15 be wrong. They could be whatever, but you say they made  
16 statements about this.

17 But they did not make -- You don't have any reason to  
18 believe, and they represent -- if I had it correct, it was just  
19 the opposite, that they made absolutely no statement on  
20 these -- in the documentary and in the outtakes about the  
21 incidents that are the subject of this lawsuit.

22 MR. SCHOEN: Well, Judge, I don't think we have that  
23 representation at all from BBC.

24 THE COURT: Maybe I didn't --

25 MR. SCHOEN: If I'm wrong, then I'm sure Mr. Korzenik

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1 will correct me. I don't think we have a representation from  
2 BBC that there's no discussion on either the documentary or the  
3 outtakes about incidents in this case or not about incidents in  
4 this case.

5 THE COURT: I thought there was such --

6 MR. KORZENIK: Well, we haven't made any statements  
7 about the outtakes themselves because we wouldn't do that.

8 THE COURT: I thought that there was some -- and maybe  
9 I'll find it as we talk, but -- I read a lot of papers; so I  
10 could be wrong. My recollection is that they -- I thought they  
11 made a specific statement that the interviews and the  
12 documentary were not about the incidents that are at issue here  
13 in this case. That's what I --

14 MR. KORZENIK: Not about that.

15 THE COURT: I thought they made that representation.

16 MR. KORZENIK: Right.

17 MR. SCHOEN: Judge?

18 THE COURT: That's what I'm saying. I assume they  
19 didn't limit that to say just the documentary that you saw  
20 itself and try to mislead us into thinking the outtakes had  
21 something to do with it.

22 MR. SCHOEN: No, because --

23 THE COURT: What I read from that is that you -- what  
24 you want to show is the -- what their statements you believe  
25 and you had reason to believe what their statements in the

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1 documentary indicate is that there is a general connection  
2 between the organizations and the defendants, and that it may  
3 even indicate a specific relationship between those  
4 organizations and the defendants with regard to certain  
5 activities.

6 But the activities that are at issue in this case,  
7 there's no reason to believe that they discussed the specific  
8 incidents that are at issue that caused injury and death in  
9 this case. And what I read from the representations, that  
10 that's not what the discussion was about.

11 MR. SCHOEN: Judge, let me --

12 MR. KORZENIK: I'll just say one thing. They all  
13 precede the event except for one.

14 THE COURT: Right.

15 MR. KORZENIK: So they all happened before the  
16 interviews occurred.

17 THE COURT: Well, I'm sorry, what all happened before  
18 the --

19 MR. KORZENIK: I'm sorry, there the -- the report  
20 is -- Some of them are on either side of the effect.

21 MR. SCHOEN: That's what we're talking about.

22 MR. KORZENIK: They are not about -- We made a  
23 statement about -- I don't have it in front of me.

24 THE COURT: Yeah, it struck me. I remember that  
25 statement.

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1 MR. SCHOEN: You're a hundred percent right.

2 THE COURT: He's not here on the tape confessing that  
3 he was involved in these incidents and he was acting on behalf  
4 of the PLO or the Palestinian Authority when he took acts that  
5 caused injury to these plaintiffs or deaths.

6 MR. SCHOEN: That's right, which made me come to the  
7 conclusion that, with all due respect to Mr. Korzenik, didn't  
8 understand our purpose, frankly, by making that representation.  
9 But I understood the point he wanted to make.

10 But, frankly, Judge, if we're basing this on the  
11 representations, which I believe to be a hundred percent true  
12 representation that this document -- they wouldn't be likely to  
13 find these kinds of things because the documentary wasn't  
14 really about that. Well, you know what, the documentary wasn't  
15 about that and look what we got? We got them saying there is  
16 no difference between Fatah and Al-Aqsa Martyrs' Brigade in a  
17 documentary that wasn't anything about that.

18 So I'd like to think that the outtakes may well give  
19 us -- if that's the premise, that we shouldn't find them  
20 because it's not about that --

21 THE COURT: Give me an example of what you hope to  
22 find in the outtakes, as specifically as you can, that you  
23 don't already have.

24 MR. SCHOEN: I hope to find a discussion about the  
25 specific attacks in which Al-Aqsa and Fatah have been engaged

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1 that these guys know about; hopefully, something to do with the  
2 attacks in this case.

3 THE COURT: Okay. But I assume if I looked at the  
4 transcript, I would find no such reference to attacks in this  
5 case because that's what they're representing to me.

6 MR. SCHOEN: Well, they haven't made any  
7 representation about the outtakes. They have not made any  
8 representation about the content of the outtakes, if I  
9 understand it. Mr. Korzenik just said we couldn't have because  
10 then --

11 THE COURT: Then I misled myself because I have to  
12 look back. They haven't made any specific reference to the  
13 outtakes, but the way they worded it gave me the impression  
14 that it was only relevant to their argument because I should  
15 know that that's not what they were talking about, these cases.

16 So I shouldn't have any concern that there is that  
17 kind of relevant information in these outtakes, as there is not  
18 that kind of relevant information in the documentary. If  
19 that's not what they meant to lead me to believe, then I don't  
20 know the relevance of that statement, and they can explain it  
21 to me. But it seems to me that, you know, if they're splicing  
22 it that fine, and I would assume not, then --

23 MR. SCHOEN: Judge, all we've heard, frankly -- I  
24 didn't mean to cut the Court off, but we heard today from  
25 Mr. Korzenik, you know what, there may be things in there that

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1 are not helpful to the plaintiff or that might compromise the  
2 plaintiff or might be contrary to the plaintiff's position. So  
3 we're hearing a number of things, I suppose, and I think  
4 rightly, I suppose, given his position, that Mr. Korzenik is  
5 not making any representation -- I'm sorry, did you want to say  
6 something about what I'm saying? Mr. Korzenik?

7 MR. KORZENIK: I see that. We say that our review  
8 revealed that none of the alleged attacks at issue in this case  
9 were the subject of or mentioned in the BBC program, and at  
10 least one such alleged attack postdated the 2003 program.

11 THE COURT: What page are you on?

12 MR. MAYTAL: Page 61 of the appendix.

13 MR. KORZENIK: 61 of our appendix, which is the last  
14 page of Itai Maytal's affidavit.

15 THE COURT: I read all that. Page 61?

16 MR. KORZENIK: Page 61 of the appendix.

17 THE COURT: It's also in the brief, too.

18 MR. MAYTAL: Is it?

19 MR. KORZENIK: Probably, probably.

20 THE COURT: I think so too because I remember that  
21 specific language.

22 MR. KORZENIK: But I mean, what's interesting is -- if  
23 I -- In discussion, what seemed interesting is that you got the  
24 show or the program as implying what might be in the tapes.  
25 It's clear that the program has no connection at all with any

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1 specific attacks.

2 And so if the logic of this speculation is that the  
3 show indicates what the tapes will offer, then the show offers  
4 no indication that the tapes will include such things as the  
5 details of the specific attack. In other words --

6 MR. SCHOEN: I hear your point, but respectfully --

7 MR. KORZENIK: Well, you can't say we hope to find  
8 this.

9 THE COURT: I don't want to interrupt Mr. Schoen. I  
10 understand.

11 MR. SCHOEN: Respectfully, Judge, the opposite is  
12 true, and that could well be why there are outtakes. Because  
13 when someone gives an interview, someone may require that, to  
14 the extent they have license to require it, that to the extent  
15 they discuss specific incidents or attacks in which they were  
16 involved, you may not air those things. That may be. That may  
17 be how they resulted to be outtakes in the case.

18 THE COURT: So what would be -- What would be greater  
19 evidence in the outtakes of this connection, other than what  
20 you already have independently been able to garner, and what  
21 the direct statements were with regard to what they said on the  
22 documents?

23 MR. SCHOEN: A description of that relationship.  
24 Because let's just say they take the position -- the other side  
25 takes the position that Mr. Korzenik articulated today, and

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1 that is, man, we were just talking. I didn't really mean it  
2 when I said Al-Aqsa and Fatah are the same. That's just --  
3 that's how we talk, but in the outtakes they were  
4 giving excellent --

5 MR. KORZENIK: Is that by veto?

6 MR. SCHOEN: Not you.

7 MR. KORZENIK: That was my reporter interview.

8 THE COURT: No, you're confusing. Don't interrupt  
9 him.

10 MR. KORZENIK: Okay. Sorry.

11 MR. SCHOEN: I meant I was speaking on behalf of  
12 Zubaidi and the other one. In any event, so to counter that  
13 argument, if the outtakes were to show that they describe very  
14 well that relationship between Fatah and Al-Aqsa, and how they  
15 take orders from Arafat, that would be further support in the  
16 face of that kind of argument that, the guy said, we're the  
17 same; when we said we're the same, we meant we're all brothers.

18 THE COURT: But you already have things to impeach  
19 such testimony. You have direct financial records. You have,  
20 you know, other witness testimony, if I'm correct.

21 MR. SCHOEN: But if they intend to challenge the  
22 accuracy of what these two said here and I have other  
23 statements they made on the outtakes, so they weren't playing  
24 any games.

25 THE COURT: Well, I mean, as they say that may put the

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1 nail in the coffin, but it doesn't give you the dead body. I  
2 mean, you've already got the -- I mean, you say that I got ten  
3 things that I can argue against them, and I hope that this  
4 outtake gives me an 11th. I mean, that's not a compelling  
5 argument that the information is -- in there is likely to be  
6 material, and it's not any indication that it's not reasonably  
7 obtainable from other sources.

8 Your argument is very compelling if I don't have to  
9 balance it with the -- as they argue, the significant and  
10 valuable policy, public policy, behind the privilege. And that  
11 is that, look, this is -- that's a great argument to make with  
12 regard to information in general that people have in their  
13 possession, but it is a different argument and a different  
14 burden that you have if you want to pull that from reporters  
15 who are out in dangerous situations, attempting to gather  
16 information to report to the public and you want to say, well,  
17 whatever you got out there, I want it because I think it might  
18 help me.

19 MR. SCHOEN: If we were referring to a private  
20 conversation with a reporter or the reporter's notes, I think I  
21 would agree. I don't think I agree here because this was a  
22 public interview these guys volunteered for, bragging during  
23 and so on, and so I think these outtakes for non-confidential  
24 materials like this are -- ought to be discoverable. And in  
25 terms of --

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1 THE COURT: But I don't know if a distinction has been  
2 that the Courts ever make between outtakes and something else.

3 MR. SCHOEN: Well, some of the cases, for example,  
4 Cutler, distinguishes between a reporter's notes and outtakes.

5 THE COURT: Well, it doesn't say that you're supposed  
6 to use some different standard and somehow it applies to one  
7 but it doesn't apply to the other.

8 MR. SCHOEN: Well, they came down in favor of the  
9 discovery of the outtakes and not the notes for the reasons  
10 they articulate. But in terms of the public's interest and the  
11 journalist's interest, Judge, the courts have spoken loudly and  
12 clearly as to Congress about an overriding public interest  
13 under the ATA. The public has a great interest in knowing what  
14 these terrorists are doing, planning and talking about. That's  
15 a great public interest here. It's been recognized over and  
16 over again.

17 THE COURT: Yeah, but your argument that you want  
18 this -- Well, I won't say primarily, that's unfair. The part  
19 of your argument that you want this for impeachment purposes is  
20 not particularly compelling for overriding their interest.

21 MR. SCHOEN: I want to be prepared --

22 THE COURT: I think I would be the first court to say  
23 that you've met your burden simply because you would argue  
24 that, well, if he decides to change his statement or explain  
25 away the direct admission of the relationship, you want to see

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1 if there's something in there to further impeach him, if that  
2 should happen.

3 MR. SCHOEN: Well, I'm not worried about him changing  
4 his statement. I'm worried about the PA and the PLO taking the  
5 position those statements were just plying around or weren't  
6 accurate or something like that, and I want to have my complete  
7 record. But, Judge --

8 THE COURT: Well, they can only take that position  
9 based on some evidence. Now, they can get up there and they  
10 can say it, but I'm sure you have even stronger arguments to  
11 make against any lawyer getting up there and saying, now, I  
12 don't, you know --

13 MR. SCHOEN: Judge, it's not hard to pull someone out  
14 of the -- Let me move past that. Judge, a fair compromise,  
15 then, to this would be, as they said in Cutler, for the Court  
16 to look at the outtakes in camera.

17 THE COURT: Well, tell me what I would be looking for.  
18 Tell me what I'm supposed to look for.

19 MR. SCHOEN: Let me say this --

20 THE COURT: When lawyers suggest that to me, I always  
21 say, well, what am I looking for?

22 MR. SCHOEN: Okay. Judge, based on what I've seen  
23 this morning in terms of your Honor's familiarity with the  
24 case, understanding of the issues and all of that, I'm not  
25 concerned. Let me put it that way. I have ultimate faith that

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1 your Honor would recognize something that your Honor understood  
2 to be relevant to the issues in this case, but specifically --

3 THE COURT: Wouldn't it have to be some information  
4 that you don't already have?

5 MR. SCHOEN: Not that we don't already have. I don't  
6 think so, Judge.

7 THE COURT: Well, why -- how could you overcome the  
8 second part of the test, if it's information you already have  
9 available?

10 MR. SCHOEN: Because of the form in which that  
11 information is given. That is, that Zubaidi and Rumaileh say  
12 it and talking about it. People intimately knowledgeable about  
13 the details of the subject matter they're discussing is much  
14 more valuable, much more important and not dupli- -- can't be  
15 duplicated from some other source. That's my position, Judge,  
16 and I'm sticking with it.

17 THE COURT: Well, you know, I have to agree -- I mean,  
18 I -- I spoke and I disclosed -- When I got this, I spoke  
19 briefly to Magistrate Judge Ellis and, quite frankly, I've  
20 spoken to District Judge Andrew Carter, because I understood  
21 that he -- you pointed out that he had some decision, and I got  
22 a copy of his decision.

23 I tend to agree with the BBC, though, that there's  
24 not -- the second part of that test, I don't see that  
25 Magistrate Judge Ellis has directly addressed in terms of its

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1 availability elsewhere.

2 MR. SCHOEN: I mean, certainly addressed, your Honor  
3 means as opposed there wasn't any in-depth analysis.

4 THE COURT: Where does he address it?

5 MR. SCHOEN: I'm reading from the Lexis decision, but  
6 I can pull up the other one. Anyway, it's towards the end. It  
7 says, "Further, the material sought is not reasonably  
8 obtainable from other available resources." He makes that  
9 finding.

10 And, again, we're here on a contrary to law, clearly  
11 erroneous standard. Now, we don't know what he weighed when he  
12 weighed the materials, and if this were a different standard,  
13 maybe we would. But we don't have to, either, to be perfectly  
14 frank and respectful of Judge Ellis. The respect, I believe,  
15 has to be accorded to him as a matter of law.

16 Judge, we've been here a long time with you. I don't  
17 know that there's anything else I need to say, but I'm happy to  
18 answer any questions. I'm afraid he's going to get up there  
19 and say something smart again.

20 THE COURT: Well, as they say, I accept that on this  
21 case it's your burden and you have to overcome what starts out  
22 as a presumption that, you know, this kind of material gathered  
23 by journalists is, even though non-confidential, is  
24 presumptively entitled to some privilege, unless you overcome  
25 it.

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1           So the question really -- and I say that the thing  
2           that I'm struggling with is the -- I think I have some concern  
3           about whether or not the first part of the test is sufficiently  
4           dealt with, given the fact that it's had to articulate what's  
5           in the outtakes that's really relevant to the issue, as you  
6           frame it, other than to say, well, if they admitted it in the  
7           documentary, there must be something else in there that's  
8           consistent with that.

9           But that doesn't -- I mean, I can overcome that, but I  
10          have a much more difficult problem with making a finding as  
11          Magistrate -- the basis for Magistrate Ellis' finding that it's  
12          not reasonably available from other sources.

13          MR. SCHOEN: Judge --

14          THE COURT: You've got some -- I mean, I could -- you  
15          could probably, not me, but you could probably rundown a list  
16          of a dozen ways, a half dozen to a dozen ways that you intend  
17          to demonstrate this connection. I cannot imagine any stronger  
18          statement in the outtakes than what you have cited to in the  
19          documentary.

20          I mean, they can explain -- attempt to explain it  
21          away, but, I mean, the guy is saying, I take orders from Yasser  
22          Arafat and Fatah, and the organization are exactly the same,  
23          and we're working at the direction of the PLO.

24          Now, they may have an explanation for that. That may  
25          be fine. Now, there may or may not be some reputation of that

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1 explanation that they may have in the outtakes, but that's sort  
2 of a little bit removed to sort of say, well, in case they come  
3 up with a way to try to squirm out of it, I want to see if  
4 there's something there that can make it more difficult for  
5 them to do so, other than all the other evidence that I have of  
6 the connection and that I intended to demonstrate even before I  
7 even heard about this documentary.

8 MR. SCHOEN: Judge, going in I would have expected,  
9 for example, a lot of evidence to come directly from the  
10 defendants that would support this saying in documents that  
11 Al-Aqsa and Fatah are the same. I think it ought to be an  
12 obvious point. We don't see that. So I have to look for every  
13 other source that I can to make that argument, and again -- I'm  
14 just repeating myself, and I'll do that once and that will be  
15 it.

16 It would be a fishing expedition if we didn't know the  
17 nature of these statements already. These statements, to me,  
18 lead to the outtakes. But I am a practical person, Judge, I  
19 will say this, I'm not looking to put the Court in an undue  
20 quandary. I think that on the standard of review that we're  
21 here for, these orders from Magistrate Judge Ellis ought to be  
22 affirmed based on his findings.

23 However, if I were to -- without waiving any position  
24 I've taken. I believe we're fully entitled to the outtakes as  
25 a matter of law. But without waiving that position, if the

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1 outcome of this were that we would get the documentary itself  
2 and authentications, which an authentication, like Magistrate  
3 Judge Ellis spoke about, and if your Honor would agree to --  
4 I'm not asking you to agree. You don't have to agree with me  
5 on anything -- or to decide that your Honor would look at the  
6 outtakes, that would be satisfactory to us, frankly, at this  
7 point. And --

8 THE COURT: Well, let me just go back to something  
9 that I probably spent more time than I should have on with  
10 that. You already have the documentary.

11 MR. SCHOEN: Yeah.

12 THE COURT: So there's no reason for me to order them  
13 to give you another copy of the documentary.

14 MR. SCHOEN: What they mean by that, of course, is  
15 that plaintiff's counsel was the same counsel who was in the.  
16 Saperestein case and that fellow was -- also counsel in this  
17 case. That fellow has a documentary they sold to him for I  
18 think a \$100.

19 THE COURT: And now you have it.

20 MR. SCHOEN: I don't, but I'm sure I can get it.

21 THE COURT: So why should I put them to the burden of  
22 giving you another?

23 MR. SCHOEN: Because I'd like to know that the  
24 documentary that we're given in this case comes from the BBC,  
25 but I'm not wed to that. All I need to get is the

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1 authentication.

2 THE COURT: But isn't that an evidentiary issue  
3 between you and the defendant? Why is that an issue between  
4 you and the BBC?

5 MR. SCHOEN: Look, I can accept if -- I can accept  
6 that they sold to Mr. Tolchin a documentary for \$100, whatever  
7 it was, and he gives that to me. I think I can make that link  
8 myself. I need the authenticity certification.

9 THE COURT: For what purpose? To do what with?

10 MR. SCHOEN: Lay a foundation for its admissibility.

11 THE COURT: Well, that's what I'm trying -- that's  
12 what I assumed where you're going.

13 MR. SCHOEN: Yes, sir.

14 THE COURT: I mean, you're trying to demonstrate a way  
15 to admit this documentary into evidence.

16 MR. SCHOEN: As an alternative to taking the  
17 deposition, which we subpoenaed, this was a proper modification  
18 that Magistrate Judge Ellis made. I'm not going to make them  
19 appear for a deposition. I'm going to get them to give you an  
20 affidavit that it is what it purports to be, that's all, and  
21 that's an appropriate business record.

22 THE COURT: I mean, I guess, at this point, it's the  
23 defense that I should turn to and figure out whether or not  
24 there's really going to be a genuine issue about the  
25 authenticity of the documentary.

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1 MR. SCHOEN: Judge, just I'm preserving my position.  
2 I believe it's a perfectly appropriate inquiry, but it is our  
3 position, we've taken the papers, that the defendant has  
4 absolutely no role in this case, cannot stand as a bar --

5 THE COURT: I understand that, but he sure can save me  
6 some headaches.

7 MR. SCHOEN: Yes, your Honor.

8 THE COURT: If -- As they say, if the lawyers -- I  
9 always try to get the lawyers to concede the obvious.

10 But, you know, I mean, are you seriously thinking  
11 about challenging the authenticity of the documentary itself?

12 MR. HILL: First of all, for the record, Brian Hill  
13 for the defendants. Your Honor, I've never seen the  
14 documentary. The plaintiffs have never produced it to me. I  
15 don't know what it is, never seen it, no idea if it's an  
16 accurate copy of what was or wasn't broadcast by the BBC.

17 I'm not in a position to waive any objections I may  
18 have at trial to this thing, including the obvious hearsay  
19 nature of it.

20 THE COURT: Well, that's a different question.

21 MR. HILL: Okay. I've never seen it. I'm not in a  
22 position to stipulate on it right now. Your Honor, while I'm  
23 here, can I make two other points and then I'll sit down?

24 MR. SCHOEN: The answer is no.

25 THE COURT: He might say something that's going to

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1 help you. I can shut him up if you want. Just because he's  
2 adverse to you, doesn't mean he might not say something that  
3 might advance this in your favor. So if you want me to tell  
4 him to sit down --

5 MR. SCHOEN: I'm not engaging in speculation, your  
6 Honor. This is your courtroom.

7 THE COURT: Go ahead.

8 MR. HILL: I just have two brief points, your Honor.  
9 You said at the outset we weren't going to talk about  
10 admissibility today. I understand that to be the case, and all  
11 my objections to this material are preserved and the fact that  
12 I'm not addressing it now is not going to be held in any way to  
13 indicate that this thing is or isn't going to come into  
14 evidence if and when I ever actually get to see it.

15 And my second point I have, I disagree with a number  
16 of things that have been said both by plaintiff's counsel and  
17 the BBC's counsel. I don't think you want me to enumerate them  
18 all here today, but I don't want the fact that I haven't  
19 engaged on any of these issues to be read in the future as  
20 silence, my silence indicating consent. And that's all I want  
21 to say.

22 MR. SCHOEN: And, your Honor, I don't think that  
23 position would be waived because we've taken the affirmative  
24 position they have no business being here in this fight.

25 THE COURT: I understand. I just -- I understand that

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1 you're concerned about the admissibility of the tape. On that  
2 issue, the part about the documentary and the -- That part, I'm  
3 going to rule on now, the part about the documentary itself,  
4 and their further affidavit or representations about the  
5 document, I'm going to -- I'm not going to enforce that part of  
6 the subpoena. I'm going to deny that without prejudice.

7 If it turns out that you need someone from the BBC to  
8 provide a witness for authentication for trial, that's a  
9 different question. That's a whole different question. That's  
10 a trial question. That is not a question now. They've,  
11 obviously, produced, in response to an original subpoena, the  
12 tape of the program that they say was responsive to that  
13 request.

14 MR. SCHOEN: Judge, I don't understand it to have been  
15 a response to a subpoena, frankly. They fought the subpoena.  
16 They sold him a videotape for \$100.

17 THE COURT: All right. Okay.

18 MR. SCHOEN: I believe -- Well, you've made your  
19 ruling. I think we're entitled to know from BBC what they gave  
20 him.

21 THE COURT: Why are you entitled to anything other  
22 than trial evidence now?

23 MR. SCHOEN: For the same --

24 THE COURT: How does that happen?

25 MR. SCHOEN: Under Rule 45 we subpoenaed their

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1 corporation for exactly this information that we're entitled  
2 to, and they're in control of it. And they're in control of  
3 the documentary; therefore, they need to attest to its  
4 authenticity. They need to attest it being a business record.

5 THE COURT: For what purpose prior to trial?

6 MR. SCHOEN: Summary judgment.

7 THE COURT: I don't even know whether this is a  
8 contested issue.

9 MR. SCHOEN: It's a contested issue, your Honor, I  
10 represent to you.

11 THE COURT: About whether or not this is, in fact, an  
12 accurate documentary?

13 MR. SCHOEN: Oh, I thought your Honor meant --

14 THE COURT: No, I'm talking about what you're asking  
15 what we're fighting about.

16 MR. SCHOEN: That was the purpose of your Honor's  
17 inquiry. We just heard they will not stipulate.

18 THE COURT: It doesn't mean they're going to win. It  
19 doesn't mean they're going to win. You know, it doesn't mean  
20 that, you know, the -- unless they -- unless we get to a point  
21 where that proof is necessary, I mean, you -- I mean, I  
22 don't -- quite frankly, I don't have any problem with what you  
23 want. And I ultimately don't have a problem, and I think the  
24 BBC should be prepared to produce an appropriate person to do  
25 so, either in person or by affidavit, and they could short

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1 circuit this if they wanted -- I assume you want it by  
2 affidavit. But I'm not even sure you're getting an affidavit  
3 from the BBC, in and of itself, is going to make it admissible.

4 MR. SCHOEN: I'll take my chances with an affidavit  
5 because Mr. Korzenik said they believed they were, at some  
6 point, prepared to give it to compromise. I'm not sure who he  
7 meant he was negotiating with at the time. He said the  
8 defendant, but he may have meant something else. I don't know,  
9 but he said --

10 THE COURT: He wasn't negotiating with you?

11 MR. SCHOEN: No, sir. He said as compromise, he was  
12 prepared to do the affidavit, but then he wants to know there  
13 will be no more. Again, it's not a negotiation with the Court,  
14 but we're entitled to that, Judge, under the subpoena, with all  
15 due respect.

16 THE COURT: Well, I think that -- Well, let's put it  
17 this way, I'm not -- you may be entitled to something, but I'm  
18 not quite sure that I even agree with the way Judge Ellis has  
19 phrased it. If you're not entitled to a -- If you're not  
20 entitled to the deposition testimony -- if he agrees that  
21 you're not entitled to the deposition testimony of somebody who  
22 is outside of this district, then I'm not sure that you're  
23 entitled to an affidavit by somebody who's outside of this  
24 district.

25 MR. SCHOEN: We don't need the affidavit from somebody

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1 outside of the district.

2 THE COURT: Well, that's the way he addressed it.  
3 That's the way he addressed it.

4 MR. SCHOEN: He appropriately modified the subpoena to  
5 make it less burdensome to BBC, quite frankly.

6 THE COURT: It's not a question of burden. It's a  
7 question of whether or not I have the power -- Suppose there's  
8 a person in England who refuses to give the affidavit? What am  
9 I supposed to do about that?

10 MR. SCHOEN: This documentary doesn't belong to that  
11 person and entity. The manner --

12 THE COURT: Who does it belong to?

13 MR. SCHOEN: It's up to this corporation, BBC, and  
14 that's what Moore says, it's in their control.

15 THE COURT: Well, then, you know, what you have to do  
16 in the first instance is give me, by letter, what it is that you  
17 want someone from the BBC to say. That's the only way I can  
18 resolve this. Now, if they want to save themselves some time,  
19 effort and headache and just get somebody who's an appropriate  
20 person who can say what you want them to say and they don't  
21 have any problems with that, then they can do that.

22 If they refuse to do that, then I can look at it and  
23 say, well, look, do I have to find some guy, you know, in the  
24 outskirts of London who's the only person who can give this  
25 affidavit? And if this person says I'm not going to give it,

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1 is there anything I can do about it?

2 MR. SCHOEN: I mean, we can extend discovery for, you  
3 know, eight months while we take a Hague deposition and that  
4 sort of thing, which isn't in anybody's interest.

5 THE COURT: I agree, but I mean, my powers are not  
6 unlimited. I'm not the Wizard of Oz here. You know, there's  
7 some restrictions on what I can do to people in England if they  
8 decide they want to ignore your subpoena.

9 MR. SCHOEN: But this modification is a compromise to  
10 avoid going to the extreme of a Hague deposition maybe.

11 THE COURT: Then I would articulate in a letter to  
12 them what it is that you want them to say -- you want someone  
13 from the BBC to say about this tape, the documentary that you  
14 already have.

15 I think with regard to your asking them for another  
16 copy, I think that part of the subpoena is moot, unless you can  
17 argue that what you have is not what you're looking for, you  
18 know. Now, if you want them to -- if you want to work out with  
19 them that they will say that what you have, that they sold you,  
20 is exactly what it is that you want them to say about it,  
21 that's fine. If they don't want to say that and they want to  
22 give you another copy, then that's fine too.

23 MR. SCHOEN: I suppose the reason that position took  
24 me a little surprised is the same reason I think your Honor had  
25 in mind. We just had a exchange of letters, in which I was

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1 virtually called all kinds of names about suggesting that we  
2 were entitled to a copy of the documentary itself, since  
3 Magistrate Judge had found that we had one already, but I think  
4 I'm hearing something a little different.

5 THE COURT: I'm mean, I'm more of a practical person  
6 than that. I think that part is much ado about nothing. I  
7 understand your concern. Your concern is not getting a copy of  
8 the tape. You have a copy of the tape. Your concern is trying  
9 to solve admissibility of the document based both on relevance  
10 and on its foundation.

11 So, you know, that -- you know, if you need -- It is  
12 clear for me to order the BBC to find the appropriate person to  
13 make the appropriate representations if you tell me what  
14 representations that you want specifically.

15 MR. SCHOEN: I hope we can work it out.

16 THE COURT: If you can work it out, I think that's  
17 best because I don't think this is something you need the  
18 assistance of a judge for, and I don't think it's something  
19 that the world is going to come to an end for either one of you  
20 if you decide to go ahead and compromise on this.

21 But the bottom line is that, you know, no, you're  
22 not -- clearly, you're not entitled to -- for me to try to  
23 force the reporter who did this story to give a deposition or  
24 to give an affidavit. You're not entitled to that.

25 Now, you may be entitled to some representation by

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1 someone who's knowledgeable in the BBC, who the BBC wants to  
2 designate as somebody who will be appropriate for you to have  
3 that representation, to make a representation that the tape  
4 that you have is, in fact, the tape that was aired on the show,  
5 the tape that was made and that was aired on the show. You  
6 know, I don't think that that conflicts with anyone's interest  
7 here, depending on what the nature of the representations that  
8 you want.

9 To the extent that you can work that out, I suggest  
10 that the two of you work that out. To the extent that you  
11 can't work it out, let me see the exact language that you ask  
12 them, who you wanted them to make a representation or what kind  
13 of person you wanted to make a representation and what  
14 representation you want them to make about the tape.

15 MR. SCHOEN: If we have to do it by letter -- maybe we  
16 won't have to, but if we have to, then I would provide the  
17 Court with a copy of the letter.

18 THE COURT: Then I can clearly look at this and I will  
19 turn to them and say, well, what's the big deal? You know,  
20 because they're not going to convince me that simply because  
21 they got employees all over the world that they get to pick  
22 somebody who's outside of this jurisdiction and say he's  
23 untouchable. That's not going to be the nature of their  
24 argument, you know.

25 They -- and unless they want to -- The more

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1 resistant -- Let's put it this way. The more resistant they  
2 are to doing something reasonable in that regard, the more  
3 likely it is that they're going to be sitting in the witness  
4 room during this trial with some representative ready to  
5 testify. I mean, that's just the way it works. If we need  
6 somebody, we need somebody. If they make it more difficult,  
7 then, ultimately, I will resolve that. I'll get the president  
8 in here. I don't care whoever is here, the local, regional  
9 New York person and do what needs to be done. So I think that  
10 that part, they can -- depending on how we resolve the other  
11 part, I think that that part is going to dissolve away pretty  
12 quickly.

13 You know, the only other thing -- you know, quite  
14 frankly, I think you still have a heavier task to convince me  
15 that you've got something new out of these outtakes that should  
16 be made available to you that you don't otherwise have  
17 available to you. And, you know, I'm prepared -- I think I'm  
18 prepared to take, depending on how voluminous the transcript is  
19 of this --

20 MR. SCHOEN: Documentary.

21 THE COURT: -- documentary and the outtakes, I'm  
22 prepared to take a look at, you know, the relevant portions, or  
23 look at the outtakes before I make a final determination. But  
24 it seems to me that, unless I see something in there that is  
25 clearly new information that you don't already have and is

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1 information that's not already -- Well, that's all I have to  
2 say. If it's not new information you don't already have, I  
3 don't see that there's a compelling interest to give you the  
4 same information in another form or at another time that you  
5 already have evidence of.

6 And clearly, in this case -- and each case is on its  
7 unique facts. Clearly, in this case, do you not only have the  
8 other evidence, it seems to me, from other sources, you have  
9 the more direct statements from the witness, whom you want more  
10 statements to back up the direct statement. It's hard for me  
11 to imagine that there's anything stronger in any of these  
12 outtakes than a statement that you cited and that were  
13 published in the documentary.

14 And without that, I think it's going to be difficult  
15 for me to be convinced that you should be able to fish through  
16 their outtakes, given the competing interest, simply so that  
17 you can attempt to find something that might be another way or  
18 an additional point to make to support the point that you  
19 independently already have evidence to establish that you  
20 believe you could establish and that you have more already have  
21 direct testimony or direct statements in the documentary itself  
22 that go right to the heart of what it is you're attempting to  
23 prove by other means, an admission by the individuals of the  
24 nature of the relationship that you are trying to prove.

25 So let me just turn back. Is there some way that I

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1 can very quickly review these materials?

2 MR. KORZENIK: Meaning the documentary itself?

3 THE COURT: I mean, I don't know what form -- Yeah. I  
4 don't know what form -- Well, I don't even know what form -- Do  
5 you have transcripts that I can look at?

6 MR. KORZENIK: Oh, is your Honor talking about in  
7 camera review?

8 THE COURT: Yeah, I'm talking about in camera review.

9 MR. KORZENIK: Here's -- I would ask that your Honor  
10 not do that because two things. One is that if -- I don't  
11 think that they should be allowed to get in camera review if  
12 they can't make the showing at the outset.

13 In other words, the question is not whether we can see  
14 if there might be something there, to see if it would allow  
15 them to meet the burden because that's upside down. And so I  
16 would ask very strongly that your Honor not command in camera  
17 review because it looks like a halfway step, but in fact, what  
18 it's really doing is it's saying we're going to take this stuff  
19 based on their saying it could do something and then I'll see,  
20 the Court will see, whether there's something that might meet  
21 the burden of relevance or unavailability.

22 So I think that that would be a mistake to do that,  
23 and we would strongly resist that. As to -- I mean, keep in  
24 mind if they're saying that this stuff is cumulative, well,  
25 there's a line of cases that makes it very clear that when

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1 things are cumulative, they can't break the privilege.

2 And also, if what they're saying is they need it for  
3 completeness, well, there's a line of cases that's very clear  
4 that completeness doesn't break any privilege, including the  
5 reporter's privilege, because the reality is it would destroy  
6 any privilege.

7 THE COURT: Well, the completeness argument we didn't  
8 discuss, but I put that aside because, quite frankly, their  
9 argument is that somehow it would make it inadmissible if the  
10 defendant decided to object to it. But I don't accept that  
11 argument because, quite frankly, given the defendant's  
12 position, the rule doesn't say they get to keep it out.

13 The rule says they get to offer the complete document,  
14 and they have made no attempt to obtain a complete document.  
15 So it's not likely that I'm going to entertain any objection  
16 that somehow if you decide to offer these outtakes, that  
17 they're not going to be admissible on the sole basis that they  
18 don't -- they don't have -- that you didn't present the entire  
19 copy of the documentary and the outtakes. They want the  
20 outtakes. Let them fight for it. That's their business.

21 MR. HILL: Your Honor, may I --

22 MR. KORZENIK: I want to emphasize one point on this,  
23 and that is that the only case that's been cited by anybody  
24 about in camera review is an in camera review as to a party  
25 litigant. And that may happen more often when people raise

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1 different kinds of business privileges and so on. And in the  
2 Forstmann case, which was the only case that they cite on this  
3 point, it was a party that plaintiff bank's documents that were  
4 subjected to in camera review.

5 So we would strongly resist the in camera review  
6 because once that's done, then the privilege is broken. And  
7 the question is, have they met their burden to warrant such an  
8 in camera review? In other words, it shouldn't be that the  
9 Court --

10 THE COURT: Well, the privilege isn't broken by the in  
11 camera review.

12 MR. KORZENIK: Well, it's partly broken by that, for  
13 sure.

14 THE COURT: What breaks the privilege is a public  
15 disclosure, not a disclosure to the Court.

16 MR. KORZENIK: The problem is, once the Courts are  
17 looking through the reporter's files in order to ascertain if  
18 there's something that would be useful, then that's exactly  
19 what I think the privilege is intended to avoid, that the press  
20 shouldn't be exposed to that type of revelation of their  
21 materials.

22 MR. SCHOEN: Judge, the Second Circuit feels  
23 differently.

24 MR. KORZENIK: Or to have them submit materials to the  
25 Court for review to make sure that it doesn't include something

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1 that might be helpful.

2 Now, the reference to Chevron and to Cutler, these are  
3 not things that were briefed. I'll only say this, that  
4 certainly as to Chevron, you have an unusual situation there,  
5 where -- and now, every plaintiff who's seeking stuff from the  
6 press is invoking Chevron every five minutes.

7 There's an allegation that the -- that the documentary  
8 that was made there was made in collusion with one of the  
9 parties, and that the lawyer for one of the parties in the  
10 Chevron main lawsuit had been engineering the documentary. And  
11 so they, therefore, wanted his and other parties' statements.  
12 They were party statements that were in collusion with the  
13 documentary filmmaker.

14 Everybody and his uncle is now pointing to Chevron in  
15 the hope that they can show collusion. There's nothing of the  
16 kind here. We're not colluding with any of these people in  
17 order to create our documentary. They didn't control our  
18 field. We have no source agreements with them. We have no  
19 deal with the people we interviewed, and that's what Chevron is  
20 about.

21 THE COURT: Well, why don't -- this is what I'm going  
22 to do, then. I'm going to give you an opportunity, Mr. Schoen,  
23 just give me a quick letter telling me why you think that in  
24 camera review is the appropriate thing at this point.

25 Then you respond to that letter, and tell me why you

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1 think that it's inappropriate. I'll make a decision based on  
2 those letters that you give me as quickly as you can. You give  
3 me a letter by next week, and I know Thanksgiving is coming up;  
4 so if you can give me a letter by the middle or the end of next  
5 week, and then you can respond by the end of the week after.

6 MR. SCHOEN: He's got all the journalists to help him  
7 with letter writing. I don't have that.

8 MR. KORZENIK: Okay.

9 THE COURT: You're more efficient than that.

10 MR. HILL: Your Honor, may I be heard briefly?

11 THE COURT: Yes.

12 MR. HILL: When I stood up last time I made the point,  
13 I believe the Court agreed with me, that we weren't going to  
14 talk about the admissibility of these materials today. In the  
15 course of the exchange the you just had, an argument was made,  
16 sort of on my behalf, that if this documentary was offered into  
17 evidence, that the defendants might object under the rule of  
18 completeness, that we don't have the complete interview.

19 As I mentioned before, I still have not seen this  
20 documentary. In fairness, your Honor, I don't know if this is  
21 an instance where there's a question and a different answer is  
22 cut or a different person's voice. I don't have any idea what  
23 this is.

24 And so I would ask the Court not, at this point, to  
25 make any rulings about the admissibility of this, including

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1 under the rule of completeness because I believe if, in fact,  
2 this documentary is offered at trial, if, in fact, the obvious  
3 hearsay nature of this is somehow overcome, I may well be  
4 saying your Honor can't offer this because I don't have the  
5 context for this entire interview, and I don't know whether  
6 it's spliced or misleading.

7 THE COURT: That's true, you may make that argument,  
8 but you know what my inquiry is going to be. My inquiry is  
9 going to be --

10 MR. HILL: Yes, your Honor.

11 THE COURT: -- well, that's fine and dandy, but you  
12 knew that this was going to be an issue. You did nothing.  
13 Sure, I may grant your request to allow you to put in the  
14 complete document, but if you tell me, oh, I don't have it,  
15 then that's not necessarily their fault.

16 MR. HILL: Right. So here --

17 THE COURT: So I'm just saying to you, you know, you  
18 guys can go strategically --

19 MR. HILL: Your Honor, this is why I raised it because  
20 the posture that we're in now is the plaintiffs are seeking to  
21 compel these outtakes, and I have not sought to compel these  
22 outtakes.

23 THE COURT: I know.

24 MR. HILL: In candor, I think the BBC has the better  
25 of the argument. Your Honor will ultimately make that ruling

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1 or not. What I don't want is to have my clients prejudiced  
2 because we haven't pursued a bad argument before your Honor to  
3 try and justify --

4 THE COURT: No, I don't think it's appropriate for you  
5 to make any argument right now. I'm giving you the benefit of  
6 my thinking that, look, you know -- First of all, I can't  
7 imagine -- They got a problem with admissibility, independent  
8 of that argument, but I don't think that argument is  
9 particularly compelling since the rule does not say it's  
10 inadmissible because it's incomplete.

11 The rule says that if they admit part of it, that you  
12 have the right to admit something that you say makes it  
13 complete. So if you have an argument at the time that you have  
14 something that you said makes it complete, I'm very willing to  
15 hear you and let you put it in, if you think it's incomplete.  
16 But if you're just sitting there saying, well, Judge, they only  
17 got part of it; so that makes it inadmissible, that's not the  
18 rule.

19 MR. HILL: And the only point I'm making is this is an  
20 argument we'll have some day, if we get to trial on this.  
21 Because I think it would be obviously prejudicial to me if the  
22 claim of privilege over the balance of the interview is  
23 sustained by the Court, and then a potentially misleading  
24 excerpt from the interview is admitted by the Court later.

25 I know you don't have to rule on this today. I just

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1 want the record to be clear that you're not ruling that I now  
2 need to seek these outtakes myself --

3 THE COURT: No, but I'm sure --

4 MR. HILL: -- or run the risk that you'll admit --

5 THE COURT: -- I'll have pointed questions for you at  
6 the time you make that objection, if you make that objection.  
7 And depending on how you answer those questions at the time  
8 will have something to do with whether or not I think you're in  
9 a position to argue that they've unfairly offered only a  
10 misleading portion out of context of a tape.

11 Quite frankly, I'm not even sure what your argument  
12 would be if you don't know what's on the outtake, if it's  
13 somehow misleading and incomplete, but that's not for me to  
14 rule at this time.

15 MR. HILL: And the only reason I made it is we're 32  
16 days from the close of discovery here, and so if I need to join  
17 in this prophylactically so I have the ability to argue that  
18 the incomplete portion can't be offered later, I don't want the  
19 Court to put me in a box in that way.

20 THE COURT: No, you're not placed in a box. I'm  
21 giving you the benefit of my thinking so you can deal with that  
22 if you have to deal with it, if it becomes an issue. My first  
23 suggestion would be if they intend to offer even the tape as  
24 they have it, if you want it, you should ask for it, and they  
25 should make it available.

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1 MR. HILL: Of course. I have, your Honor, and they  
2 would have an obligation to give it to me. You won't be  
3 surprised that we're 17 months into discovery, they've had it  
4 the entire 17-month discovery period. Rule 26(a)(1) required  
5 them to give it to me when Judge Ellis entered the scheduling  
6 order last June, and they still haven't given it to me, which  
7 is another reason why --

8 MR. SCHOEN: Judge, a bunch of nonsense. A bunch of  
9 nonsense. And that's why he's here today. Wait until you see  
10 the papers that have been filed and what's been given and what  
11 hasn't been given.

12 THE COURT: I don't need a debate about it.

13 MR. SCHOEN: We don't need to be cheap shot either.

14 THE COURT: Look, gentlemen, I don't need to debate  
15 about that. I'm a very practical guy. There's a lot of cute  
16 arguments, but the reality is that you got the tape. If you  
17 intend to use it as evidence, you better make sure, if he's  
18 asked for it, that he gets it. Okay?

19 And you know what the issues are, that -- you know,  
20 I'm not responding to you. I'm responding to them, their  
21 argument that somehow I should be persuaded to force them to  
22 give the outtakes because you might make the argument that  
23 somehow their tape is inadmissible and it's not complete.

24 Well, make that argument out here, but right now, it's  
25 not a very persuasive argument to me because I hear of no

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1 effort that they're making to get the other portions of the  
2 tape that they want played. And if they say to me it's  
3 incomplete, then I will turn to them and say, well, you can  
4 play the complete part. And then they will turn to me and say,  
5 I don't have it. Then I'll say to them, well, what makes you  
6 think it's misleading and incomplete? And they'll say, well,  
7 we just assumed that. And I'll say, well, that's not a good  
8 basis for an objection.

9 If your other objection is valid, nevertheless, you  
10 have some case law that tells me that's a basis for an  
11 objection, and that's not what the rule says. The rule says  
12 that if they offer a portion, then you can offer the other  
13 portion.

14 MR. SCHOEN: Let me say this, Judge. They knew  
15 perfectly well that they were trying to get an authenticated  
16 copy here, and that's what we would turn over under Rule 26.

17 Let me be clear. Mr. Hill is being a little modest  
18 when he said we didn't support the plaintiff's position in this  
19 because we thought they had the better part of it. They  
20 submitted a letter opposing to the motion to compel. So he is  
21 affirmatively is on record already when he makes that argument.  
22 You'll see his November 17th, 2011, letter opposing the  
23 production of the documentary.

24 THE COURT: That's all very interesting, gentlemen,  
25 but totally irrelevant to the decision I'm getting ready to

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1 make.

2 MR. HILL: Well, your Honor, it may be relevant in  
3 this one respect, and that's why I rose because your Honor  
4 suggested you may look at this material in camera. I don't  
5 know if you'll end up doing that or not, but if you do, I think  
6 in fairness to the defendants, if the material you review is  
7 inconsistent or reveals that it's been edited in some  
8 misleading fashion by the BBC -- and, again, I don't know  
9 whether it has for not -- you know, your Honor is going to know  
10 that and none of us will. And so that's why -- I don't know  
11 whether that means you should review it or not, but I just put  
12 that out there.

13 THE COURT: I'm not sure what your application is.

14 MR. HILL: Well, I'm not sure what it is either,  
15 frankly, your Honor.

16 THE COURT: All right then.

17 MR. HILL: I just rise to point this out because if  
18 you're going to know what's on these tapes, and I'm not going  
19 to know what's on these tapes because you're going to sustain  
20 the claim of privilege --

21 THE COURT: That's the definition of in camera.

22 MR. HILL: -- then it's potentially problematic for  
23 you when you're ruling later on objections about completeness  
24 when you know something that the parties don't. And I don't  
25 know whether counsel is in favor of you looking at them or not.

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1 And I don't know whether that counsel is in favor of you  
2 ordering it to be disclosed if you should.

3 THE COURT: That's what I'm say, is there something  
4 you want me to do?

5 MR. HILL: Well, your Honor, I want you to consider  
6 the potential prejudice to the defendants as you look at this  
7 material in making your decision about whether or not it should  
8 be turned over because --

9 THE COURT: And do what? Are you telling me you don't  
10 want me to turn it over?

11 MR. HILL: Well, your Honor, I don't -- you're going  
12 to rule on whether the BBC has met its privilege or not -- has  
13 supported whether it's privileged or not. My armchair view of  
14 that is irrelevant. But what is relevant to me and my clients  
15 is that we not be prejudiced.

16 If, in fact, there is material in the outtakes that  
17 would impeach or undercut or otherwise be inconsistent or put  
18 into context the material that BBC chose to edit and put in the  
19 broadcast, and if the edited broadcast will be admitted into  
20 evidence, which is something we don't know because we're not at  
21 trial, I would ask the Court to consider whether, in fairness,  
22 the balance of that material needs to be produced to the  
23 defendants so they may defend themselves at trial.

24 It would be patently unfair for the defendants, when  
25 the plaintiffs have sought this for your Honor to sustain a

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1 privilege, and then for your Honor to allow a misleading  
2 portion of the materials in, particularly if your Honor knows  
3 that it's misleading. That's the only point.

4 THE COURT: I understand the issue in the abstract. I  
5 think it's highly unlikely that I will find myself in a  
6 position to discover such, or to make that kind of  
7 determination on your behalf.

8 MR. KORZENIK: Just one quick case that addresses this  
9 issue, and it may be some of some interest that we cite in  
10 footnote 8, on Page 7, it's U.S. versus Lefevre, 7th Circuit  
11 case. And there they say Rule 106, which I assume relates to  
12 this completeness issue, is not intended to override every  
13 privilege and other exclusionary rule of evidence in the legal  
14 armamentarium, they say.

15 So there must be cases where if an excerpt is  
16 misleading, the only cure is to exclude it rather than to put  
17 in other excerpts. So there is -- that's -- some of the  
18 incompleteness line of cases are very reluctant to sacrifice a  
19 privilege because of the completeness demand because it would  
20 swallow all privileges.

21 THE COURT: Well, you know, the reality is that I  
22 think that my -- if I decide to do an in camera review, it's  
23 clear to me that what I would be looking for is relevant --  
24 other relevant statements with regard to the substance of the  
25 issue that we're discussing.

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1           Whether it's relevant statements that are consistent  
2 with or inconsistent with the statements during the  
3 documentary, would be -- would not be the issue. If it turns  
4 out that there are relevant statements -- quite frankly, if it  
5 turns out that there are relevant statements that are  
6 inconsistent with it, it's probably more likely that that would  
7 be a reason to disclose it to both sides than a reason not to  
8 disclose it.

9           But, obviously, you know, if he made some, as I said,  
10 unknown or un -- already undisclosed statement with regard to  
11 the subject matter that we're discussing, if that is something  
12 that is clearly unknown to the parties and is revealed by in  
13 camera review, then it's going to, obviously, play a factor in  
14 whether or not I think this should be disclosed to the  
15 plaintiff.

16           Because, at this point, that's the only application  
17 that I have, that they be ordered to respond to the subpoena.  
18 If you have some other application that you want to make to me  
19 by letter application, fine. I'll entertain it, but as I  
20 understand it, you've taken no position with regard to these  
21 issues except to the extent that you've opined that you believe  
22 that the plaintiff does not have a basis to compel this  
23 disclosure.

24           Now, if you think that you want to take a different  
25 position, then you should do so in writing by letter and let

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1       them respond to it, but --

2               MR. SCHOEN: Judge, before we leave, I just want to  
3 say, it's not me talking, it's the Second Circuit in Cutler  
4 that quotes an earlier decision in in re: Burke, which is found  
5 at --

6               MR. KORZENIK: I have to say that I'm not familiar  
7 with that case. It's not been briefed, and I'd like an  
8 opportunity to address it.

9               MR. SCHOEN: Cutler is probably the best known case in  
10 this area by the second circuit.

11              THE COURT: What point do you want to make?

12              MR. SCHOEN: What they say, I mean, this is an expert  
13 in the field who teaches in the field.

14              THE COURT: If it was that relevant, it would have  
15 been in this volume of documents that I had to read, in the  
16 briefs.

17              MR. SCHOEN: I wish it had a role in the document.  
18 United States versus Burke is 700 F.2d 70, Second Circuit,  
19 circ. denied, 464 US 816 it's 1983. What the Cutler court  
20 says, "In Burke, we encouraged an in camera review as a  
21 precautionary measure before a definitive ruling to exclude  
22 access to assertedly privileged materials, especially when the  
23 materials are not voluminous." And we don't know the answer to  
24 that last part.

25              And in Burke, by the way, they did the review, and

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1 they found that the materials were just cumulative, and my  
2 recollection is, they didn't turn them over.

3 THE COURT: All right. Well, you know, you can cite  
4 Burke and Cutler in your letter, and I will review your letter  
5 in furtherance to that application. And then I'll let them  
6 respond to it. And then I'll make the immediate decision  
7 whether I'm going to order in camera review, and if not, I will  
8 go ahead and decide whether to enforce or quash the subpoena.

9 MR. SCHOEN: So should we say by the end of the week  
10 my submission?

11 MR. KORZENIK: Of next week?

12 MR. SCHOEN: Yes. And then what do you want?

13 THE COURT: A week.

14 MR. KORZENIK: Can you give us -- If you could just  
15 maybe run into the Tuesday of the next week. I'm just not sure  
16 what my own schedule is.

17 THE COURT: Tuesday of which week?

18 MR. KORZENIK: The following -- In other words, it  
19 would be a week -- So you're going to submit something not this  
20 coming Friday but the following Friday?

21 THE COURT: Before the 30th. On or before the 30th of  
22 November.

23 MR. KORZENIK: Right. So if they get the two weeks,  
24 I'd like a little bit more time. Can you give us to the middle  
25 of the week after so that we have a week and a half?

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1 THE COURT: December 12th? That's the Wednesday of  
2 them.

3 MR. KORZENIK: December 12. If you could make it the  
4 13th because I have to be in -- Make it the 13th, if you could.

5 THE COURT: All right.

6 MR. KORZENIK: Because I've got a hearing on the 11th.

7 THE COURT: All right. 13th is fine. That's Thursday  
8 the 13th.

9 MR. HILL: Your Honor, I'm sorry to be the third  
10 world. It's not clear to me whether you want a submission from  
11 me. If so, when you would like that in the process that was  
12 just outlined here?

13 THE COURT: I don't particularly want anything from  
14 you, but if you want something from me, you should do it by  
15 the -- If you have a different position on any of these issues,  
16 other than your non-position, or to the extent that you've  
17 already articulated in your writing, then you should give me a  
18 letter telling me what it is you want me to consider.

19 MR. HILL: And should I do that after the BBC's  
20 submission, your Honor?

21 THE COURT: No, you should do that immediately.

22 MR. KORZENIK: And, your Honor, just for the --

23 THE COURT: Your issue has nothing do with their  
24 submission.

25 MR. HILL: Just so I'm clear, what would you like to

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1 have a submission from me regarding?

2 THE COURT: Nothing. If you want me to do  
3 something -- You raised -- you commented on several issues. If  
4 there's some relief you want from me, or you want me to do  
5 something, tell me what it is.

6 MR. HILL: Well, may I submit three days after the  
7 BBC's letter, once I've seen their positions so I know whether  
8 or not we wish to take a position?

9 THE COURT: I'm not sure that -- No, I'm not sure that  
10 that's fair. I mean, you don't get to say I'm not weighing in,  
11 and then you wait until everybody says what they have to say,  
12 and then you want to weigh in. I mean, you know what the issue  
13 is between them. You've taken the position that you don't --  
14 you're not asking me to do one thing or another, but you think  
15 that the BBC has a more valid position. I understand that.  
16 What else you want to say to me, I'm not sure.

17 MR. HILL: All right. I'll think about it, your  
18 Honor.

19 THE COURT: But if you have some different  
20 application, you raised some issues at the end but, you know, I  
21 should be concerned about if I'm looking at the documents.

22 MR. HILL: What I'm thinking about, and I'll do it in  
23 a letter, obviously, but what I'm wondering if it would make  
24 sense to have a preliminary ruling on the admissibility with  
25 respect to the completeness objection.

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1 THE COURT: No. The answer is no. I'm not in a  
2 position at this point in time to make any ruling on that, nor  
3 I think you're in a position to argue that. I don't know what  
4 foundation would ultimately need to be made with regard to its  
5 admissibility or what arguments -- or legitimate arguments you  
6 might have at the time.

7 It is very premature for me to resolve that issue.  
8 You can sit around and start to anticipate what arguments you  
9 might want to make, and lay a groundwork to make those  
10 arguments, but at this point in time, I have no idea whether or  
11 not this tape is going to be relevant, admissible, there's  
12 going to be an appropriate foundation laid, how it's going to  
13 come in, for what purpose. So, you know, or whether or not  
14 there's going to be a dispute at that time.

15 MR. SCHOEN: Judge, to be clear. We're here about the  
16 issue of the subpoena, and the cases are clear. I'm going to  
17 cite to O'Brien versus Barrows (phonetic), 2010 U.S. District  
18 Lexis 112870.

19 MR. KORZENIK: Is that in your papers?

20 MR. SCHOEN: I'm not sure. It might be.

21 THE COURT: But I know what you're going to cite to  
22 me. It says the defendants have nothing to do with this.

23 MR. SCHOEN: Question of standing, plaintiff --  
24 defendant generally without standing to contest the subpoena  
25 issued to a third party, unless he has his own independent

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1 privilege claim.

2 THE COURT: That was my best guess, you know.

3 MR. KORZENIK: Just a quick thing on scheduling, your  
4 Honor, Itai points out to me that we have this kind of floating  
5 problem with this one other case that if we could make it that  
6 Friday, I'd be grateful.

7 THE COURT: That's the 14th?

8 MR. KORZENIK: Is that the Friday?

9 THE COURT: Yup. So give me everything before then,  
10 and then I'll deal with this rule.

11 MR. SCHOEN: Now, we've got less time than you.

12 THE COURT: I think it's enough time. As a matter of  
13 fact, they should probably get it in even earlier.

14 MR. SCHOEN: What day of the week is the 30th?

15 THE COURT: 30th is the Friday. That's why I gave you  
16 until Friday, because of the holidays, and I'll give you until  
17 two weeks after that.

18 MR. KORZENIK: The 14th or 15th, whatever is the  
19 Friday.

20 THE COURT: 14th. If there's something you want me to  
21 do, you should give me before the 30th.

22 MR. HILL: Before the 30th, yes, your Honor.

23 THE COURT: And then they can respond.

24 MR. SCHOEN: Thank you, your Honor.

25 THE COURT: All right. Thanks a lot. Have a good

CBJPSOK2

1 day.

2 MR. KORZENIK: Thank you very much, your Honor, for  
3 the time you've given us.

4 MR. SCHOEN: Thank you.

5 THE COURT: Thanks to the court reporter.

6 (Adjourned)  
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